C 1.12/3:5/24

Volume 5, No. 24, Pages 6947 to 7198,
November 19 - November 30, 1990.

SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY
Room

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

Andrew C. Barrett

Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. § 1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: **5 FCC Rcd 1 (1990)**

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

JAN 2 1991

Depository Document

Federal Communications Commission Record

Volume 5
Issue 24

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... x

Table by Statutory and Rule Provisions..... xiii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 6947

Federal Communications Commission Record

Table of Cases
Volume 5
Issue 24

Case Name	Page
AT&T Communications	7000
Alascom, Inc.	7103
Allnet Communications Services, Inc.	6967
Amendment of Part 22 - License Renewals	7130
Amendment of Part 22 - Revise Filing Procedures	7116
Amendment of Parts 21, 43, 74, 78 and 94 - Multipoint Distribution	7042
Amendment of Rules - FM and TV Authorizations	7094
American Communications Network, Inc.	7114
American Indian Broadcast Group, Inc.	7087
American Telephone & Telegraph Company	7101
American Telephone and Telegraph Company	7040
American Telephone and Telegraph Company	7038
American Telephone and Telegraph Company	7041
Ameritech Operating Companies	7120
Ameritech Operating Companies	7115
Annual Report Form M	6947
Arms, Lorraine Walker	7013
BellSouth Telephone Companies	7007
Belwen, Inc.	7112
Cable & Wireless Communications, Inc.	6999
Cablevision VI, Inc.	7166
Channel One Communications, Inc.	6965
Coast TV (ERRATUM)	7157
Contel Corporation	7107
Continental Cablevision of New Hampshire, Inc.	7159
Delta Telephone Company, Inc.	7100
Dickeyville Telephone Corp.	7104
Escotel Cellular	6996
Fee Decisions of the Managing Director	7143
Freedom Communications, Inc.	7029
Givens, Roxanne	7010
Golden Gulf Coast Broadcasting Company	7084
Great Lakes Broadcasting, Inc.	7003
Hearing/Speech Impaired Individuals	7187
Horseshoe Bay Centex Broadcasting Co.	7125
Houston Cellular Telephone Company	7140
KIRO, Inc.	7105
Kosciusko Educational Broadcasting Foundation	7106
Kriz Broadcasting, Inc.	7160

FEDERAL COMMUNICATIONS COMMISSION

Case Name	Page
MCI Telecommunications Corporation	6998
Maricopa County Community College District	7009
Meredith Corporation	7015
Mid-Plains Telephone Company, Inc.	7050
Morris, Audrey R.	6966
Naleszkiewicz, Nancy	7131
National Exchange Carrier Association, Inc.	7184
Nelson, Harry (ERRATUM)	7142
New England Telephone and Telegraph Co.	7170
New England Telephone and Telegraph Company	7122
New York Telephone Co.	7173
Northern California Region 6 Public Safety Plan	7123
Open Network Architecture	7008
Pacific Bell	7176
Peoples Telephone Co., Inc.	7012
Progressive Communications, Inc.	7058
Rates Technology, Inc.	7057
Rates for Dominant Carriers	7139
Revision of Part 15 - Radio Frequency Devices	7060
Richardson Broadcasting Group	6964
Royce International Broadcasting (KWOD-FM)	7063
SDCEA, Inc.	6978
Sellers, Gary	7082
Southern Bell Telephone and Telegraph Company	7121
Southwestern Bell Telephone Company	7179
Southwestern Bell Telephone Company	7111
Sundown Communications	7079
TCI Cablevision of Texas, Inc.	7168
Table of Allotments, FM, Ballston Spa and Saratoga Springs, NY	7043
Table of Allotments, FM, Barbourville, KY	6972
Table of Allotments, FM, Barstow, CA	6961
Table of Allotments, FM, Bethany Beach, DE	7144
Table of Allotments, FM, Big Rapids and Whitehall, MI	7150
Table of Allotments, FM, Clarksburg, WV	7075
Table of Allotments, FM, Deer River, MN	7033
Table of Allotments, FM, Dorrington, CA	7020
Table of Allotments, FM, Fairfield, ME	6960
Table of Allotments, FM, Garrison, KY	7071
Table of Allotments, FM, Georgetown, KY	7145
Table of Allotments, FM, Gluckstadt and Collins, MS	6974
Table of Allotments, FM, Greenwood, SC and Gibson, GA	7022
Table of Allotments, FM, Healdsburg, CA	7026
Table of Allotments, FM, Hilo and Kealakekua, HI	6986

Case Name	Page
Table of Allotments, FM, Jackpot, NV	7154
Table of Allotments, FM, Lafayette, LA	6954
Table of Allotments, FM, Lebanon, Molalla and Tillamook, OR	6982
Table of Allotments, FM, Littlefield, TX	6968
Table of Allotments, FM, Los Lunas, NM	7073
Table of Allotments, FM, Lynchburg, VA	6962
Table of Allotments, FM, Marquette, MI	6993
Table of Allotments, FM, Mineral Wells, and Winters, TX	6970
Table of Allotments, FM, Monroeville and Thomasville, AL	7027
Table of Allotments, FM, Monterey, TN	6958
Table of Allotments, FM, Monticello, NY	7110
Table of Allotments, FM, Morristown, NY	6976
Table of Allotments, FM, Mount Vernon, IL	7147
Table of Allotments, FM, Ozark, AL	7035
Table of Allotments, FM, Pamplico, SC	7077
Table of Allotments, FM, Pasco, WA	7152
Table of Allotments, FM, Petal and Newton, MS	6984
Table of Allotments, FM, Plymouth, IN	7045
Table of Allotments, FM, Riviera Beach, FL	6995
Table of Allotments, FM, Show Low, AZ	7149
Table of Allotments, FM, South Bend, WA	6956
Table of Allotments, FM, St. Marys, KS	7108
Table of Allotments, FM, Sweet Home, OR	7156
Table of Allotments, FM, Thomasville, AL	7046
Table of Allotments, FM, Thousands Palms, CA	7019
Table of Allotments, FM, Tusculum, TN	7069
Table of Allotments, FM, Volga, SD	7024
Table of Allotments, FM, Waynesboro, TN	7048
Taft Broadcasting Company and Northern New England Television	6988
Telesphere Network, Inc. (ERRATUM)	7032
The Cromwell Group, Inc.	7092
Traffic Aggregators	7037
Virgin Islands Telephone Corporation	7158
Ware, Lawrence C.	7183
Welch Communications, Inc.	7066

Table of Cases by Delegated Authority and FCC Number
Volume 5
Issue 24

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 90 -1234	7160	DA 90 -1655	7073
DA 90 -1246	7079	DA 90 -1656	7075
DA 90 -1247	7082	DA 90 -1657	7071
DA 90 -1248	7084	DA 90 -1658	7144
DA 90 -1250	7087	DA 90 -1659	7145
DA 90 -1251	7092	DA 90 -1660	7147
DA 90 -1544	7143	DA 90 -1661	7149
DA 90 -1568	6947	DA 90 -1662	7150
DA 90 -1583	6954	DA 90 -1663	7152
DA 90 -1584	6956	DA 90 -1664	7020
DA 90 -1585	6958	DA 90 -1665	7019
DA 90 -1586	6960	DA 90 -1666	7024
DA 90 -1587	6961	DA 90 -1667	7022
DA 90 -1588	6962	DA 90 -1668	6998
DA 90 -1589	6968	DA 90 -1669	6999
DA 90 -1590	6970	DA 90 -1670	7110
DA 90 -1616	7026	DA 90 -1671	7077
DA 90 -1617	7027	DA 90 -1672	7069
DA 90 -1618	7043	DA 90 -1673	7156
DA 90 -1619	7045	DA 90 -1674	7154
DA 90 -1620	7046	DA 90 -1675	7108
DA 90 -1621	7048	DA 90 -1676	7037
DA 90 -1622	7033	DA 90 -1677	7012
DA 90 -1623	7035	DA 90 -1679	7040
DA 90 -1624	6982	DA 90 -1680	7038
DA 90 -1626	6984	DA 90 -1681	7041
DA 90 -1627	6986	DA 90 -1682	7042
DA 90 -1628	6993	DA 90 -1683	7139
DA 90 -1629	6995	DA 90 -1684	7142
DA 90 -1631	6972	DA 90 -1685	7032
DA 90 -1632	6974	DA 90 -1686	7057
DA 90 -1633	6976	DA 90 -1687	7100
DA 90 -1649	6996	DA 90 -1688	7120
DA 90 -1650	7007	DA 90 -1689	7121
DA 90 -1651	7000	DA 90 -1690	7122
DA 90 -1652	7008	DA 90 -1692	7107
DA 90 -1653	6967	DA 90 -1693	7103
DA 90 -1654	6978	DA 90 -1694	7157

FEDERAL COMMUNICATIONS COMMISSION

Delegated Authority or FCC Number	Page
DA 90 -1695	7123
DA 90 -1696	7106
DA 90 -1697	7105
DA 90 -1698	7104
DA 90 -1699	7101
DA 90 -1708	7131
DA 90 -1709	7130
DA 90 -1710	7114
DA 90 -1711	7111
DA 90 -1712	7115
DA 90 -1714	7112
DA 90 -1715	7140
DA 90 -1716	7158
DA 90 -1717	7159
FCC 90 - 332	6988
FCC 90 - 357	7166
FCC 90 - 359	7168
FCC 90 - 361	6965
FCC 90 - 362	7029
FCC 90 - 365	7013
FCC 90 - 368	7015
FCC 90 - 371	7060
FCC 90 - 372	7116
FCC 90 - 374	7094
FCC 90 - 376	7187
FCC 90 - 383	7170
FCC 90 - 384	7173
FCC 90 - 385	7176
FCC 90 - 386	7179
FCC 90 - 387	7183
FCC 90 - 388	7184
FCC 90 - 389	7058
FCC 90 - 390	7063
FCC 90 - 391	7050
FCC 90 - 395	7125
FCC 90R - 108	6964
FCC 90R - 109	6966
FCC 90R - 110	7003
FCC 90R - 111	7009
FCC 90R - 112	7010
FCC 90R - 114	7066

Table of Cases by Docket Number
Volume 5
Issue 24

Docket Number				Page
CC	Dkt.No.87	-	313	7139
CC	Dkt.No.88	-	161	7116
CC	Dkt.No.90	-	327	7000
CC	Dkt.No.90	-	358	7130
CC	Dkt.No.90	-	571	7187
CC	Dkt.No.90	-	591	7131
GEN	Dkt.No.87	-	389	7060
GEN	Dkt.No.90	-	54	7042
GEN	Dkt.No.90	-	287	7123
MM	Dkt.No.84	-	352	7058
MM	Dkt.No.84	-	934	7157
MM	Dkt.No.85	-	395	7015
MM	Dkt.No.87	-	28	7063
MM	Dkt.No.88	-	86	7003
MM	Dkt.No.88	-	407	6964
MM	Dkt.No.88	-	432	7066
MM	Dkt.No.88	-	442	7009
MM	Dkt.No.88	-	526	7094
MM	Dkt.No.88	-	542	6982
MM	Dkt.No.89	-	80	7013
MM	Dkt.No.89	-	157	7149
MM	Dkt.No.89	-	316	6976
MM	Dkt.No.89	-	345	6961
MM	Dkt.No.89	-	362	7027
MM	Dkt.No.89	-	387	7010
MM	Dkt.No.89	-	404	7022
MM	Dkt.No.89	-	423	6995
MM	Dkt.No.89	-	439	7035
MM	Dkt.No.89	-	467	6960
MM	Dkt.No.89	-	490	6986
MM	Dkt.No.89	-	498	7144
MM	Dkt.No.89	-	579	7150
MM	Dkt.No.90	-	12	7019
MM	Dkt.No.90	-	203	7045
MM	Dkt.No.90	-	228	7026
MM	Dkt.No.90	-	305	6966
MM	Dkt.No.90	-	334	7156
MM	Dkt.No.90	-	348	7142
MM	Dkt.No.90	-	389	7110
MM	Dkt.No.90	-	418	7160
MM	Dkt.No.90	-	429	7084
MM	Dkt.No.90	-	430	7079
MM	Dkt.No.90	-	432	7092
MM	Dkt.No.90	-	433	7082
MM	Dkt.No.90	-	434	7087
MM	Dkt.No.90	-	550	6954
MM	Dkt.No.90	-	551	6956
MM	Dkt.No.90	-	552	6958
MM	Dkt.No.90	-	553	6962
MM	Dkt.No.90	-	554	6968
MM	Dkt.No.90	-	555	6970
MM	Dkt.No.90	-	562	7043
MM	Dkt.No.90	-	563	7046
MM	Dkt.No.90	-	564	7048
MM	Dkt.No.90	-	565	7033
MM	Dkt.No.90	-	566	6984
MM	Dkt.No.90	-	567	6993
MM	Dkt.No.90	-	568	6972
MM	Dkt.No.90	-	569	6974
MM	Dkt.No.90	-	574	7073
MM	Dkt.No.90	-	575	7075
MM	Dkt.No.90	-	576	7071
MM	Dkt.No.90	-	577	7145
MM	Dkt.No.90	-	578	7147
MM	Dkt.No.90	-	579	7152
MM	Dkt.No.90	-	580	7020
MM	Dkt.No.90	-	581	7024
MM	Dkt.No.90	-	585	7108
MM	Dkt.No.90	-	586	7077
MM	Dkt.No.90	-	587	7069
MM	Dkt.No.90	-	588	7154

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 5
Issue 24

Rulemaking Number	Page	Rulemaking Number	Page
RM - 6122	7094	RM - 7339	7110
RM - 6462	6982	RM - 7341	7156
RM - 6682	6982	RM - 7345	6954
RM - 6694	7027	RM - 7385	6956
RM - 6709	6976	RM - 7393	7071
RM - 6751	6986	RM - 7421	6984
RM - 6805	7035	RM - 7431	6962
RM - 6849	6961	RM - 7442	6968
RM - 6878	6995	RM - 7444	7046
RM - 6893	7027	RM - 7453	6970
RM - 6895	7022	RM - 7468	6993
RM - 6916	7144	RM - 7469	7048
RM - 7029	6960	RM - 7476	6972
RM - 7065	7150	RM - 7479	7069
RM - 7087	7019	RM - 7492	7147
RM - 7133	7022	RM - 7503	7020
RM - 7184	6986	RM - 7507	7145
RM - 7228	7045	RM - 7510	6974
RM - 7236	7075	RM - 7521	7024
RM - 7293	7026	RM - 7522	7154
RM - 7330	7152	RM - 7525	7043
RM - 7331	6958	RM - 7532	7077
RM - 7338	7108	RM - 7534	7073
		RM - 7536	7033

Table of Cases by City
Volume 5
Issue 24

City/State	Page	City/State	Page
Anderson, IN	7112	Los Lunas, NM	7073
Ballston Spa, NY	7043	Lynchburg, VA	6962
Barbourville, KY	6972	Marquette, MI	6993
Barstow, CA	6961	Mineral Wells, TX	6970
Beach, FL	7087	Molalla, OR	6982
Bethany Beach, DE	7144	Monroeville, AL	7027
Big Rapids, MI	7150	Monterey, TN	6958
Clarksburg, WV	7075	Monticello, NY	7110
Clayton, MO	6965	Morristown, NY	6976
Collins, MS	6974	Mount Vernon, IL	7147
Dayton, TX	7168	Newton, MS	6984
Deer River, MN	7033	Ocean Springs, MS	7084
Des Moines, IA	7166	Ozark, AL	7035
Dorrington, CA	7020	Paintsville, KY	7082
Eden Prairie, MN	7010	Pamplico, SC	7077
Eufaula, AL	7142	Pasco, WA	7152
Fairfield, ME	6960	Pawley's Island, SC	6966
Garrison, KY	7071	Petal, MS	6984
Georgetown, KY	7145	Phoenix, AZ	7009
Gibson, GA	7022	Plymouth, IN	7045
Gluckstadt, MS	6974	Riviera Beach, FL	6995
Grants Pass, OR	7029	Sacramento, CA	7063
Greenwood, SC	7022	Santa Barbara, CA	7157
Healdsburg, CA	7026	Saratoga Springs, NY	7043
Hilo, HI	6986	Seattle, WA	7105
Huron, OH	7003	Show Low, AZ	7149
Inverness, FL	7015	South Bend, WA	6956
Jackpot, NV	7154	South Pines, NC	6964
Kealakekua, HI	6986	St. Marys, KS	7108
Kosciusko, MS	7106	Swanton, OH	7066
Lafayette, LA	6954	Sweet Home, OR	7156
Las Vegas, NV	7013	Temple, TX	7058
Lebanon, OR	6982	Thomasville, AL	7046
Lenoir, NC	7079	Thomasville, AL	7027
Littlefield, TX	6968	Thousands Palms, CA	7019
Llano, TX	7125	Tillamook, OR	6982

City/State	Page
Tusculum, TN	7069
Vancouver, WA	7160
Volga, SD	7024
Waynesboro, TN	7048
Whitehall, MI	7150
Wilmore, KY	7092
Winters, TX	6970

Subject Index
Volume 5
Issue 24

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Integration of ownership into management, quantitative aspect	7058, 7063
Limited partnership	7063
Site availability or suitability	7003
Orders or Notices	
Lottery to select licensee	7160, 7142 7084, 7087
Pleadings, parties requested to file	7131
Pleadings, untimely	7131
Broadcast Radio Services - General Rules	
Changes, renewals in existing stations	
Assignment or transfer of control, application for voluntary	7125
Licenses and permits	
Multiple ownership of broadcast stations in the same service	6965, 7015
Policies of the FCC	
Night time service areas/Class II and III AM sations; computation	7106
Program contents	
Contests	7105
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	6954, 6956 6961, 6962 6972, 6974 6984, 6986 7043, 7045 7033, 7035 7026, 7022 7150, 7149 7144, 7152 7075, 7073 7156, 7154
Broadcasting - Noncommercial Educational FM	
Applications and licenses	
Licensing requirements	7106

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Cable Television Service	
Markets and services	
Crossownership: limitation on cable company carrying a TV signal	7166
Network nonduplication protection	
Signals, priority of	7168
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	7012, 6978
Commission Organization	
Common Carrier Bureau	
Functions: recommend/administer policies for services for hire	7187
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	7007, 7000 7040, 7038
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	7107
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	7170, 7173
Complaints to the commission	6996
Consolidation,acquisition and control of telephone companies	7050
Extension of lines, certificate for	7012, 7104
Pole attachments, regulation of	7159
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	6996
Procedural and Administrative provisions	
Joint Boards-cooperation with State Commissions, use of	7050
Radio, provisions relating to	
Construction permits	7101, 7101
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	7112
Requirements, general application	7112
Applications and licenses, processing	
Dismissal and return	7112

Subject	Page
Practice and Procedure	
Common carriers: complaints	
Formal or informal	6998, 6999
Common carriers: complaints, informal	
Form	6996
Procedure	6996
Hearing proceedings: presiding officer's rulings	
Interlocutory ruling, appeal from	7010, 7066
Hearing proceedings: review proceedings	
Decision, appeal and review of initial	7009
Information, general	
Rules, suspension, amendment, waiver	7120, 7121
Pleadings, briefs	
Extension of time, motions for	7130
Pleadings and filing periods, provisions regarding	7116
Proceedings, miscellaneous	
Forfeiture proceedings	7114
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	7058
Reconsideration of a final FCC action, petition for	7112, 7158
Rulemaking proceedings: proceedings	
Comments and replies by interested persons	7130
FM/television/air-ground table of assignments, comments filed re	7094
Public Mobile Service	
Applications and licenses-filing requirements	
Filing, fees and numbers of copies	7116
Waiver of rules, conditions for granting	7116
Domestic public cellular radio telecommunications service	
Service areas	7140
Rates of Return	
Reports	
Rate of return reports for common and exchange carriers	7170
Telecommunications Companies: Classes A and B	
Nonregulated activities	7107

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.091(m) Delegated Authority of Common Carrier Bureau	7187
000.291 authority delegated	7103
000.291 authority delegated	7111
000.291 authority delegated	7115
000.415 Comments and replies	7130
000.457 Records not routinely available for public inspectio	7184
000.459 Requests that materials or information submitted to	7184
001.045 Pleadings, filing periods.	7116
001.046 Motions for extension of time	7130
001.080 Forfeiture proceedings.	7114
001.106 Petitions for Reconsideration	7112
001.106 Petitions for reconsideration	7158
001.115 Application for Review	7058
001.276 Dismissal of Application	7009
001.301 Appeal, Dismissed	7010
001.420 Procedures for Amending FM and TV Tables of Allotmen	7094
001.711 Formal or informal complaint	6967
001.711 Formal or informal complaints	6998
001.711 Formal or informal complaints	6999
001.711 Formal or informal complaints	7032
001.716 Informal Complaints Form	6996
001.717 Informal Complaints, Procedure	6996
021.013(c) Additional application information submission req	7112
021.020(d) Failure to timely submit information dismissal	7112
021.028(d) Failure to prosecute dismissal	7112
021.032 Consideration of applications	7112
022.006 Filing of applications, fees, and numbers of copies.	7116
022.190 Waiver of rules.	7116
022.903 Cellular System Service Areas. HOST	7140
032.014 Regulated Accounts	7107
032.023 Nonregulated Activities	7107
032.5082 Switched access revenue	7170
032.5082 Switched access revenue	7173
032.5082 Switched access revenue	7176
032.5082 Switched access revenue	7179
032.7360 Other nonoperating income	7173
032.7360 Other nonoperating income	7176
032.7360 Other nonoperating income	7179
032.7360 Other nonoperating income /	7170
036.000 Appendix-Glossary, Study Area	7100
047 C.F.R. § 204(a), and § 0.291 instant tariff revisions	7000
047 C.F.R. §§ 204(a), 403 lawfulness of tariff revisions	7000
047.000 C.F.R. Section 0.291 authority delegated	7007
063.001 Contents of Application	7012
063.001 Contents of Applications	7104
063.001 Technical content of applications	6978
064.605 TDD Relay Service /	7187
064.901 Allocation of Costs	7107
065.600 Rate of return reports	7173
065.600 Rate of return reports	7176

065.600 Rate of return reports 7179
065.600 Rate of return reports / 7170
069.602 Board of Directors 7183
069.605 Reporting and distribution of pool access revenues 7050
069.605 Reporting and distribution of pool access revenues / 7183
069.606 Computation of average schedule company payments 7050
072.3555 Multiple Ownership 7029
073.1216 Licensee-conducted contests 7105
073.202 FM Table of Allotments 6956
073.202 FM Table of Allotments 6960
073.202 FM Table of Allotments 6961
073.202 FM Table of Allotments 6972
073.202 FM Table of Allotments 6974
073.202 FM Table of Allotments 6984
073.202 FM Table of Allotments 6986
073.202 FM Table of Allotments 6993
073.202 FM Table of Allotments 6995
073.202 FM Table of Allotments 7019
073.202 FM Table of Allotments 7020
073.202 FM Table of Allotments 7027
073.202 FM Table of Allotments 7033
073.202 FM Table of Allotments 7035
073.202 FM Table of Allotments 7045
073.202 FM Table of Allotments 7046
073.202 FM Table of Allotments 7069
073.202 FM Table of Allotments 7071
073.202 FM Table of Allotments 7108
073.202 FM Table of Allotments 7144
073.202 FM Table of Allotments 7145
073.202 FM Table of Allotments 7147
073.202 FM Table of Allotments 7149
073.202 FM Table of Allotments 7150
073.202 FM Table of Allotments 7152
073.202 FM Table of Allotments, ... 7026
073.202, FM Table of Allotments 6954
073.202, FM Table of Allotments 6958
073.202, FM Table of Allotments 6962
073.202, FM Table of Allotments 6968
073.202, FM Table of Allotments 6970
073.202, FM Table of Allotments 6976
073.202, FM Table of Allotments 6982
073.202, FM Table of Allotments 7022
073.202, FM Table of Allotments 7024
073.202, FM Table of Allotments 7043
073.202, FM Table of Allotments 7048
073.202, FM Table of Allotments 7073
073.202, FM Table of Allotments 7075
073.202, FM Table of Allotments 7077
073.202, FM Table of Allotments 7110
073.202, FM Table of Allotments 7154
073.202, FM Table of Allotments 7156
073.3540 Application for Voluntary Assignment or transfer of 7125
073.3555 Multiple Ownership 6965
073.3555 Multiple Ownership 6988

073.3555 Multiple ownership 7015
073.3555 Multiple Ownership 7125
073.4163 Noncommercial Nature of Ed.B/C Stations 7106
073.503 Noncommercial FM Service; Promotional Announcements 7106
073.685 Transmitter location and antenna system 7029
076.092 Network Non-duplication; Extent of Protection 7168
076.151 Syndicated Program Exclusivity: Extent of Protection 7168
076.501 Cross-Ownership 7166
122.922 Transfers and Assignments of Applications 7131
204.000; Rev. of Rates and Carges; § 61.42 tarf. price cap 7139
300.208 Complaints to the Commission 6996
300.214 Extension of Lines 7012
300.214 Extension of Lines 7104
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7170
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7173
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7176
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7179
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7183
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7184
300.221 Special Provisions Relating to Telephone Companies 7050
300.224 Regulation of pole attachments 7159
300.225 Telecommunications Services for hearing/speech impai 7187
300.309 Action Upon Applications; Form of and Conditions Att 7101
300.3156 Satellite operation 7015
300.319 Construction Permits 7101
300.399B Public B/C Stations; Advertisements 7106
300.410 Use of Joint Boards-Cooperation With State Commissio 7050
300.503 Forfeitures 6996
300.613 Ownership Restrictions 7166
300.711 Closed-Captioning of Public Service Announcements 7187
400.05552 Public Information; agency rules, opinions, orders 7184
47 Section 0000.291 authority delegated 7037
500.100 HDO 7079
500.100 HDO 7082
500.100 HDO 7084
500.100 HDO 7087
500.100 HDO 7092
500.100 HDO 7160
500.100 HDO, ERRATUM 7142
500.100 Hearing Designation Order 7131
500.128 Misrepresentations 7131
500.130 Qualification 7131
500.3003 Administrative law judge, authority of 7013
500.3035 Integration of Ownership into Management, Quantitat 7058
500.3035 integration of ownership into management, quantitat 7063
500.3068 Failure to prosecute 7013
500.309 Action Upon Applicaiton 7131
500.318 Site Availability/Suitability - Remand 7003
500.3220 limited partnership 7063
Attorney-Client Privilege; 1.301 Appeal 7066
Filings by BOCs re: ONA; 47 Section 0.291 authority delegate 7008
Pet. re: Aggregators IXCs Traffic under AT&T 7037
Section 1.3 of Commission Rules; good cause shown 7120
Section 1.3 of Commission Rules; good cause shown 7122

Section 1.3 of Commission Rules; good cause shown / 7121
Voice and data communications; 47 Section 0.291 authority de 7038
Voice and data communications; 47 Section 000.291 authority 7040
Voice and data communications; 47 Section 000.291 authority 7041

7121
7038
7040
7041

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 17

Released: November 19, 1990

Responsible Accounting Officer

Annual Report Form M - Corrections and Clarification of Certain Instructions and Schedules

The purpose of this letter is to advise reporting carriers that we are making minor corrections to the Instructions and Schedules of the Annual Report Form M. The corrections to the Form M instructions are described in Attachment A, and the corrections to the Form M schedules are described in Attachment B.

This letter and attachments are issued under Section 0.291 of the Commission's Rules. Applications for review under Section 1.115 of the Commission's Rules must be filed within 30 days from the date of public notice of this letter.

If you have any questions, contact John T. Curry or Virginia Brockington at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

ATTACHMENT A

The clarification and corrections to Form M Instructions appear below.

General Instructions:

Corrected paragraph (e) reads as follows:

(e) Schedule B-1, Balance Sheet Accounts, and Schedule I-1, Income Statement Accounts, shall be filed in accordance with the provisions and instructions of the ARMIS USOA Order (Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules) DA 88-2066, released January 6, 1989). Paper copies of Table I of the ARMIS USOA Report shall be redesignated as Schedule B-1 and Table II of the ARMIS USOA Report shall be redesignated as Schedule I-1 and filed as a part of the Form M. All footnotes filed with the ARMIS USOA Report shall also be filed as part of the Form M. Any discrepancies between data items filed in the ARMIS USOA Report and in the Form M must be noted. In addition, on Schedule I-1 carriers are required to show the total compensation for the year and the total number of employees at the end of the year in a footnote. The number of employees at the end of the year shall be broken down by full time and part time employees. Schedules redesignated as B-1, I-1 and Schedule B-6a are reported in thousands of dollars. All other schedules shall be rounded to the nearest dollar provided that amounts are appropriately adjusted to agree with the totals.

Schedule B-1, Balance Sheet Accounts

Corrected reference sentence in the instruction reads as follows:

(See General Instruction (e).)

Schedule B-6b, Analysis of Telecommunications Plant Adjustment

Corrected Instruction 2 reads as follows:

2. Report on line 1 in column (c) the aggregate balance of acquisitions having debit balances and on line 1 in column (d) the aggregate balance of acquisitions having credit balances at the beginning of the calendar year. The net of aggregate debit and aggregate credit balances shall be reported on line 1 in column (e).

Schedule B-7, Capital Leases

Corrected Instruction 2 reads as follows:

2. In Column (a) on page 1, list in account number order each category of plant (Class B account level) for which capital leases are recorded. (*See* Section 32.2000(j) for Class B category of plant for Accounts 2110 through 2410.)

Schedule B-10, Long-Term Debt

The corrected title reads as follows:

Schedule B-10 - Long-Term Debt

Schedule B-15, Capital Stock and Funded Debt Reacquired or Retired During the Year

Corrected Instruction 5 reads as follows:

5. With respect to columns (i) to (n), inclusive, report dispositions of discounts, premiums, and expenses in the year in which the dispositions are made. Do not report normal amortization of amounts includable in Account 4220, Discount on Long-Term Debt, or Account 4230, Premium on Long-Term Debt, through charges or credits to Account 7510, Interest on Funded Debt. If any amounts are to be amortized, state that fact in a note, describe the plan of amortization (including the period thereof), and give references to (1) the public authorities (if any) having jurisdiction over each transaction, (2) their authorization (*e.g.*, case or docket number), and (3) this Commission's ap-

proval of the proposed accounting. In columns (k) and (l) report the call or tender premiums associated with the reacquired securities, and in columns (m) and (n) report the other associated cost of reacquisition, including brokerage fees and unamortized discounts, premiums and issuance costs associated with the securities reacquired.

Schedule I-1, Income Statement Accounts

Corrected reference sentence in the instruction reads as follows:

(*See* General Instruction (e).)

Schedule I-6, Advertising

Corrected Instruction 6 reads as follows:

6. On lines 8 through 27, individually disclose any advertising costs recorded in Account 7370, Special Charges.

Definitions for Schedule-1, Outside Plant Statistics

The definition for deep sea cable is separated from the definition of submarine cable and will appear as Item 11. Item 10 will remain Item 10. Items 9, 10, and 11 read as follows:

9. Submarine Cable - Cables that are submerged and cross large bodies of water. Cables in this environment are laid directly on the bottom and not enclosed within a protective cover such as conduit. The cables in this environment can have transmission paths comprised of either metallic conductors or non-metallic fibers.

10. Submarine cable facilities can be found in both the distribution/exchange or interoffice facilities.

11. Deep Sea Cable - Cables that are designed for use in deep sea water such as the Atlantic or Pacific Ocean.

Items 11 and 12 are renumbered as Items 12 and 13.

Items 25, 26, and 27 are renumbered as Items 14, 15, and 16.

Items 13, 14, and 15 are renumbered as Items 17, 18, and 19 and renumbered Item 19 reads as follows:

19. Fiber Miles Lit - The portion of fiber miles that are equipped with electronics for transmission use or are ready for use.

Items 16 through 22 are renumbered as Items 20 through 26 and renumbered Items 20 through 26 read as follows:

20. Number of Poles - The sum of solely owned and portions of jointly owned poles.

21. Equipped Miles of Tube in Coaxial Cable - Coaxial sheath miles times the number of tubes equipped with electronics.

22. Conduit System - Pipe placed in the ground (which is reusable in place) through which cables are pulled.

23. Trench Miles - Length of the ditch that contains the duct.

24. Duct Miles - The number of ducts times the trench miles.

25. Radio Relay - Equipment that is used to transmit and receive radio waves through space over which communications channels are provided.

26. Miles of System - Total distance between repeater sites making up microwave radio systems above 890 mhz. Where a system meets another company's system, only include mileage to the border of the adjacent company. Do not include satellite systems in this total.

Item 23 renumbered as Item 27 and reads as follows:

27. Miles of Radio Channel - Total miles of one-way radio channel used for message, special services, video, or protection. A radio channel consists of a single link using a microwave transmitter and receiver. The radio channel mileage is the sum of the mileages of each link associated with a transmitter-receiver pair. Where a radio channel interfaces with that of another company, only include mileage to the border of the adjacent company. In the case of satellite systems, calculate mileage as the terrestrial distance between the receiver and transmitter terminal locations and add a footnote to indicate the satellite mileage included in the total.

Item 24 renumbered as Item 28 and reads as follows:

28. Miles of Equivalent 4khz Telephone Channel - Number of equivalent 4khz telephone circuit miles that are equipped and on radio systems. This value is the weighted sum of the number of 4khz circuits on each link times the length of the link and is larger than the radio channel mileage unless most radio systems carry no active circuits.

Items 28 through 33 are renumbered as Items 29 through 34. Renumbered Items 29, 30, 31, and 32 read as follows:

29. Total Equipped Channel Miles - Total equivalent 4khz telephone grade circuit miles in carrier plant.

30. Equivalent 4khz Analog Carrier Channel Miles - Includes open wire, paired cable (K, N1, N2, N3, N4, ON, ON/K), microwave radio (TL, TM, TD2, TD3), and other analog microwave. (Reported in circuit miles for interoffice only.)

31. Weighted DS-1 Digital (or Equivalent) Carrier Channel Miles - Includes lightguide (fiber) cables, digital subscriber paired cable (T1, T1C, T1D, T2), microwave radio (DR 11-40, other digital microwave). (Reported as equivalent 64kb/sec circuit miles for interoffice only.) Weight each DS-1 channel by multiplying by 24 before entering this data item, since a DS-1 can be equipped with up to 24 voice grade circuits operating at 64kb/sec.

32. Video - Miles of derived video channel. (Interoffice only.)

Definitions for Schedule S-2, Access Lines in Service by Technology

The title for Schedule S-2 in this caption is corrected and the caption reads as follows:

Definitions for Schedule S-2 - Switched Access Lines in Service by Technology

Items 34 through 39 are renumbered as Items 35 through 40. Renumbered Items 35 and 40 read as follows:

35. Central Office Switch - A piece of electromechanical or electronic hardware for establishing connections from lines to lines, lines to trunks, and trunks to trunks. (Excludes operator service centers.)

* * * * *

40. Analog PBX and Centrex Access Trunks - Equivalent 4khz analog access circuits or trunks between the Central Office and a customer location PBX or Centrex; service is provided by equipment located on customer-controlled space including Centrex-CU Trunks, PBX Trunks, Hotel/Motel LD Trunks, and Multi-Line Semi-Public Lines.

Item 40 is renumbered as Item 41 and reads as follows:

41. Analog Centrex Extensions - Equivalent 4khz circuits connecting a Centrex or PBX on telephone company premises to telephones on the customer's premises; service is provided by equipment on telephone company owned or leased space including Centrex-CO Lines.

The definition for "Other" is separated from the other categories and will appear as Item 42. Item 42 reads as follows:

42. Other - Includes digital extensions and any switched access lines not included in columns (c) through (h). Use a footnote to itemize separate categories which are included here.

Items 41 through 44 are renumbered as Items 43 through 46. Renumbered Item 46 reads as follows:

46. Do not include circuits that provide access to an interexchange carrier in this schedule.

Definitions for Schedule S-3 - Access Lines in Service by Customer

Item 45 is renumbered as Item 47.

Item 46 is renumbered as Item 48 and reads as follows:

48. Single Line Business - A single business network access line (based upon billing records) which serves one party (i.e., 1MB) and is billed at the single line subscriber line rate.

Items 47 through 52 are renumbered as Items 49 through 54. Renumbered Items 49, 52, and 54 read as follows:

49. Multi-Line Business - Multi-Line business network access lines (based upon billing records) include Multi-Line Semi-Public Lines, PBX Trunks, Centrex-CU Trunks, Hotel/Motel LD Trunks and Centrex-CO Lines.

* * * * *

52. Mobile Access Lines - Access lines to a common carrier base station using mobile radio.

* * * * *

54. For Schedule S-3, ISDN and other digital access lines should be reported as 4khz or 64kb/sec equivalents. A DS-1 line, for example, corresponds to 24 4khz or 64kb/sec equivalents.

Definitions for Schedule S-4 - Telephone Calls

Item 53 is renumbered as Item 55 and is placed as the first item under section "Definitions for Schedule S-4 - Telephone Calls."

Item 54 is renumbered as Item 56 and reads as follows:

56. All billed access minutes (originating and terminating) and call counts should reflect completed calls. Where completed call data is unavailable, you may estimate the number of completed calls, but indicate your methodology and source data in a footnote.

Specific Instructions for Statistical Schedules

Schedule S-1, Outside Plant Statistics

Corrected Instruction 2 reads as follows:

2. Report the mileage at the end of the year for all solely owned plant and respondent's proportionate interest in jointly owned plant.

Instruction 10 is renumbered as Instruction 5; Instruction 8 is renumbered as Instruction 6; Instruction 9 is renumbered as Instruction 7; and Instructions 5 through 7 are renumbered as Instructions 8 through 10. Renumbered Instructions 5, 9, and 10 read as follows:

5. Miles of fiber and miles of coaxial tube should be included in columns (d), (f), (h), (j), (l), (n), and (p) along with wire mileage even though the heading states "wire".

* * * * *

9. For column (r) provide the total deployed fiber miles, not just the amount equipped with carrier equipment or in service.

10. In columns (w), (x), and (y) report the aggregate number of miles of system or channel, as appropriate, between the individual stations or radio-relay systems. In column (y) include 64kb/sec digital circuit miles in the total, where applicable.

Schedule S-2, Access Lines in Service By Technology

The corrected title to Schedule S-2 reads as follows:

Schedule S-2, Switched Access Lines in Service By Technology

Corrected Instruction 2 reads as follows:

2. In column (b) provide for each state or territory the total number of Central Office Switches. If more than one switch is housed in a single building or structure, be sure to count each switch separately. Do not separately count each three-digit telephone number prefix as a separate switch. Column (b) should include the number of remote switches, but a footnote should be used to show the number of remote switches included in the total, where applicable.

Corrected Instruction 4 reads as follows:

4. In column (d) provide the number of 64kb/sec or equivalent access lines or ISDN B channels where applicable. Do not include access lines connecting to a customer location PBX or Centrex.

Instruction 10 is renumbered as Instruction 7 and Instructions 7 through 9 are renumbered as Instructions 8 through 10. Renumbered Instructions 7 and 10 and Instructions 11 and 12 read as follows:

7. Any individual 64kb/sec circuits to a PBX or Centrex not sold as part of an entire DS-1 should be noted in a footnote and added to column (f). If you do not know that a DS-1 associated with switched services connects to a customer PBX or Centrex, still include these in column (f) but provide their quantity in a footnote.

* * * * *

10. In column (i) provide, in terms of equivalent 4khz Analog Circuits or 64kb/sec data circuits, the number of other switched access lines not included in columns (c) through (h), and indicate the types in a footnote.

11. Column (i) (other) should include digital Centrex extensions. Quantities for any item included in column (i) should be separately noted in a footnote.

12. This schedule should not include any special access lines. All special access lines should be included in Schedule S-3, column (g).

Schedule S-3, Access Lines in Service By Customer

Corrected Instructions 3, 4, and 5 read as follows:

3. In column (h), the total access lines is the total of columns (b) through (g). Total switched access lines, the total of columns (b) through (f) on Schedule S-3, should also equal the total of columns (c) through (i) on Schedule S-2.

4. Column (g) should include equivalent 64kb/sec, 4khz, or DS-1's weighted as in Schedule S-2. For example, the number of DS-1's should be multiplied by 24 before including in the total. If the customer does not have access to the entire DS-1, include the number of 64kb/sec or equivalent circuits the customer is being provided. Report in a footnote the number of special access lines included in column (g) which are digital.

5. Columns (b) through (f) on Schedule S-3 should equal the total of columns (c) through (i) on Schedule S-2; DS-1's should be multiplied by 24 before inclusion.

Schedule S-4, Telephone Calls

Corrected Instructions 6, 7 and 8 read as follows:

6. Billed access minutes should be based on bills sent to customers (interexchange carriers). Include total originating and terminating access minutes of

use. For calls where this data is unavailable, a statistically valid calculation may be made based on other data. In such cases, provide a footnote describing the source data and methodology.

7. In column (d), the number of interstate toll calls includes outward calls, 800 service, directory service and dial-it service. Calls should *not* be double counted at the originating and terminating ends.

8. In column (f), the number of intrastate toll calls includes outward calls, 800 service, directory service, dial-it service, and optional calling plans. Calls should *not* be double counted at the originating and terminating ends.

Schedule S-5, Interstate Private Line Statistics

Corrected paragraph under Instruction 2 reads as follows:

2. *****

"Customers" denotes persons, firms, or corporations that contract for private line service and are responsible for the payment of charges and compliance with rules and regulations of the respondent. When more than one contract has been made with the same customer, count all contracts covering the same class of service billed to the customer at the same accounting center as one customer.

Corrected Instruction 3 reads as follows:

3. Exclude from this schedule data relating to leases, the revenue from which is included in Account 5240, Rent Revenue.

Checklist for Schedules S-1 through S-4

Corrected checklist reads as follows:

Before submitting your FCC Form M statistical schedules, make the following consistency checks:

1. (Schedule S-1): Be sure that each nonzero entry in columns (d), (f), (h), (j), (l), or (n) is paired with a nonzero entry in columns (c), (e), (g), (i), (k), or (m) respectively, or vice versa. Any nonzero value less than 1 should *not* be represented as zero but may be listed as 1.

2. (Schedule S-1): Please check the number of miles of wire (column (p)) and the miles of cable (column (o)) and be sure you have provided all required data. Also be sure you have provided wire miles in column (p) and not sheath miles.

3. (Schedule S-1): Miles of cable - Be sure that column (o) equals the total of columns (c), (e), (g), (i), (k), and (m).

4. (Schedule S-1): Miles of wire in cable - Be sure that column (p) equals the total of columns (d), (f), (h), (j), (l), and (n).

5. (Schedule S-1): If you have not included or have indicated as zero a figure for the number of fiber miles of fiber which is lit or equipped with carrier equipment in column (q), note that this data is now required.

6. (Schedule S-1): If you have not included a figure for the total number of fiber miles of fiber (lit and dark) deployed (column (r)) and you have fiber in your facility base, be sure that this information is provided.

7. (Schedule S-1): Please be sure that the number of fiber miles of lit fiber (column (q)) is less than the total number of fiber miles (column (r)).

8. (Schedule S-1): The number of equivalent 4khz channel miles (column (y)) should be greater than the number of miles of radio channel (column (x)), and the number of radio channel miles (column (x)) should be greater than the number of radio system miles (column (w)). Any nonzero entry in column (w) should generally be matched with nonzero entries in columns (x) and (y) and vice versa. Be sure that all required data are provided in columns (w), (x), and (y).

9. (Schedule S-1): If columns (z) and (aa) (carrier channel miles) are zero or blank, be sure all applicable data have been provided.

10. (Schedule S-1): If column (aa) is more than 100 million or less than 1 million, recheck the number and be sure that the number of DS-1 miles is appropriately weighted by 24.

11. (Schedule S-2): The number of switches listed in column (b) should not be zero for a local exchange carrier.

12. (Schedule S-2): If there are fewer than 1,000 access lines per switch, please check the number of switches (column (b)) and access lines (columns (c) through (i)). There may be too many switches indicated, too few access lines, or missing data.

13. (Schedule S-2): If there are more than 15,000 access lines per switch, please check the number of switches (column (b)) and access lines (columns (c) through (i)). There may be too few switches indicated or too many access lines.

14. (Schedule S-2): If your entries in columns (c), (d), and (f) are less than .5% of the entries in columns (c) through (i), verify that the amount of digital access in your facility base is this small. Please provide any missing data where applicable.

15. (Schedule S-2): If the ratio of column (d) to column (f) is less than 1 or more than 25, check the validity of data entered in columns (d) and (f).

16. (Schedule S-2): If you provide nondigital access to main telephones, please check to make sure that there is a nonzero entry in Schedule S-2, column (e).

17. (Schedule S-2): If column (f) is not a multiple of 24, please be sure that an appropriate footnote is provided as described in Instruction 7 of Schedule S-2.

18. (Schedule S-2): The total of columns (c) through (i) in Schedule S-2 should match column (h) minus column (g) in Schedule S-3. Total access lines should be the same no matter how categorized. In some cases a footnote may be required to explain discrepancies. Also, please make sure that special access lines are not included in Schedule S-2.

19. (Schedule S-3): The total switched access lines, columns (b) through (f), should equal the sum of columns (c) through (i) on Schedule S-2.

20. (Schedule S-3): Column (h) (Total Access Lines) divided by column (g) (Special Access Lines) should typically be less than 100. If you provide special access and your ratio exceeds 100, further follow-up may be necessary.

21. (Schedule S-4): If you have not included any interstate calls for column (d), note that column (d) should include all completed interlata toll interstate calls originated in your jurisdiction. Please review your submission to make sure you have provided all required data.

22. (Schedule S-4): The number of billed interstate call access minutes (column (e)) divided by the number of interstate calls (column (d)) should approximate twice your average call holding time. If this is not true, or if the above ratio is less than 6 minutes, check columns (d) and (e). Zero or missing data could be causing this. Make sure you have provided all applicable data and that both originating and terminating access minutes have been included.

23. (Schedule S-4): The number of billed interstate call access minutes (column (e)) divided by the number of interstate calls (column (d)) should approximate twice your average call holding time. If this is not true, or if the above ratio is more than 16 minutes, please check columns (d) and (e). Zero or missing data could be causing this. Make sure that originating and terminating access minutes have been included.

24. (Schedule S-4): If you have not included any intrastate calls for column (f), note that column (f) should include all completed interlata toll intrastate calls originated in your jurisdiction. Please review your submission to make sure you have provided all required data.

25. (Schedule S-4): The number of billed intrastate call access minutes (column (g)) divided by the number of intrastate calls (column (f)) should approximate twice your average call holding time. If this is not true, or if the above ratio is less than 6 minutes, please check columns (g) and (f). Zero or missing data could be causing this. Make sure you have provided all applicable data and that both originating and terminating access minutes have been included.

26. (Schedule S-4): The number of billed intrastate call access minutes (column (g)) divided by the number of intrastate calls (column (f)) should approximate twice your average call holding time. If this is not true, or if the above ratio is more than 16 minutes, check columns (g) and (f). Zero or missing data could be causing this. Make sure that originating and terminating access minutes have been included.

ATTACHMENT B

The clarification and corrections to Form M Schedules appear below.

Schedule B-5b, Analysis of Entries in Accumulated Depreciation (Account 3100)

Dollar signs are placed in columns (i), (j), (k), (l), and (m) on line 32.

Schedule B - 6a, Analysis of Entries in Property Held for Future Telecommunications Use (Account 2002)

A dollar sign is removed from column (b) on line 1.

Schedule I-5b, Prepaid Taxes and Tax Accruals (Accounts 1300, 4070 and 4080)

Dollar signs are placed in columns (h) and (i) on line 1.

Schedule I-6, Advertising

A dollar sign is placed in column (b) on line 8.

Schedule I-10, Analysis of Dividend and Interest Income

The letter heading in column (d) is centered.

Schedule S-1, Outside Plant Statistics

Corrected heading in column (q) reads as follows:

Fiber Miles Equipped with Electronics (Lit)

Corrected heading in column (r) reads as follows:

Total Fiber Miles Deployed (Lit and Dark)

Corrected caption overriding columns (z), (aa) and (bb) reads as follows:

Total Equipped Channel Miles (Cable and Microwave Systems)

Schedule S-2, Access Lines in Service By Technology

The corrected title to Schedule S-2 reads as follows:

SWITCHED ACCESS LINES IN SERVICE BY TECHNOLOGY

Schedule S-4, Telephone Calls

Corrected caption overriding columns (h) and (i) reads as follows:

Total Interlata Toll Calls

Corrected columns (e), (g) and (i) read as follows:

(e): Billed Access Minutes

(g): Billed Access Minutes

(i): Billed Access Minutes

Schedule S-6, Overseas Telephone and Related Services

A dollar sign in column (c) is moved from line 2 to line 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-550

In the Matter of

Amendment of Section 73.202(b), RM-7345
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Lafayette FM Joint Venture (petitioner), permittee of Station KRRQ(FM), Channel 238A, Lafayette, Louisiana, requesting the substitution of Channel 238C2 for Channel 238A at Lafayette and modification of its construction permit to specify operation on the higher class channel.

2. An engineering analysis shows that Channel 238C2 can be allotted to Lafayette in compliance with the Commission's minimum distance separation requirements at the site specified by petitioner, which is located 24.1 kilometers (15.0 miles) northwest of the community.[1] Use of this restricted site will prevent a short-spacing to Channel 237C3, Bayou Vista, Louisiana.

3. As requested, we shall propose to modify the license of Station KRRQ(FM) at Lafayette to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Lafayette.

4. In view of the fact that Station KRRQ(FM) could expand its service area, the Commission believes the public interest would be served by proposing the substitution of Channel 238C2 for Channel 238A at Lafayette. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lafayette, Louisiana	233C,238A, 260C	233C,238C2, 260C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 10, 1991,** and reply comments on or before **January 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Charles L. Spencer
Herbert & Spencer
701 Laurel Street
Baton Rouge, LA 70802
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 238C2 at Lafayette are 30-21-44 and 92-12-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-551

In the Matter of

Amendment of Section 73.202(b), RM-7385
Table of Allotments,
FM Broadcast Stations.
(South Bend, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Blue Denim Music, Inc. (petitioner), requesting the allotment of Channel 289C3 to South Bend, Washington, as the community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that South Bend is an incorporated city located in southwestern Washington, and the county seat of Pacific County, Washington. The city population is 1,686 and the county population is 17,237.[1] Petitioner notes that there are no broadcast stations licensed to serve South Bend. An engineering analysis has determined that Channel 289C3 can be allotted to South Bend in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. We believe the public interest would be served by proposing the allotment of Channel 289C3 to South Bend, since the community could receive its first local FM service. Since South Bend is located within 320 kilometers (200 miles) of the U.S. Canadian border, concurrence of the Canadian government will be requested.

4. Accordingly, for reasons stated above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
South Bend, Washington	--	289C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 10, 1991,** and reply comments on or before **January 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner as follows:

Dorothy B. Brazeau, President
Blue Denim Music, Inc.
2065 Ocean Avenue
Raymond, WA 98577

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures taken from the 1980 U.S. Census.

[2] The coordinates for Channel 289C3 are North Latitude 46-39-48 and West Longitude 123-48-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-552

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Monterey, Tennessee) — RM-7331

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Manna Broadcasting Company, Inc. (petitioner) proposing the allotment of Channel 284A to Monterey, Tennessee.[1] Petitioner failed to state that it will apply for Channel 284A, if allotted, and should correct this deficiency in response to this *Notice*. *See* paragraph 2 of the attached appendix.

2. Channel 284A can be allotted to Monterey in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.5 kilometers (8.4 miles) northeast of the city in order to avoid a short-spacing to unoccupied but applied for Channel 284A at Coalmont, Tennessee.[2]

3. In view of the fact that Monterey, Tennessee, could receive its second local FM service, we believe the public interest would be served by proposing the allotment of Channel 284A to that community. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Monterey, Tennessee	295C2	284A, 295C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 10, 1991,** and reply comments on or before **January 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kevin Paul
Manna Broadcasting
WATX Radio Station
P.O. Box 49665
Algood, Tennessee 38501
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is also the licensee of daytime-only Station WATX(AM), Algood, Tennessee.

[2] The coordinates for Channel 284A at Monterey are North Latitude 36-15-29 and West Longitude 85-10-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-467

In the Matter of

Amendment of Section 73.202(b), RM-7029
Table of Allotments,
FM Broadcast Stations.
(Fairfield, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7823 (1989), issued in response to a petition filed by Fairfield Broadcast Partners (petitioner), proposing the substitution of FM Channel 228C3 for Channel 227A at Fairfield, Maine. Petitioner also requested modification of its construction permit for Channel 227A to specify operation on Channel 228C3. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 228C3 for Channel 227A at Fairfield, Maine, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the petitioner's specified site.[1] Since Fairfield is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. The application for Channel 228C3 at Fairfield must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine. In addition, we have authorized a modification of the construction permit for Channel 227A, Fairfield, Maine, to specify operation on Channel 228C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Fairfield, Maine	228C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 227A, Fairfield, Maine, IS MODIFIED to specify operation on Channel 228C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 228C3 are 44-45-00 and 69-41-15. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-345

In the Matter of

Amendment of Section 73.202(b), RM-6849
Table of Allotments,
FM Broadcast Stations.
(Barstow, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 31, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 6210 (1989), issued in response to a petition filed on behalf of Hub Broadcasting, Inc. (petitioner), permittee of Station KXXZ(FM), Channel 240A, Barstow, California, proposing the substitution of Channel 240B1 for Channel 240A and the modification of its permit accordingly. Petitioner filed comments in support of the proposal. Late-filed comments were submitted by the Barstow Amateur Radio Club ("BARC"),[1] to which petitioner responded.[2]

2. As indicated in the *Notice*, Channel 240B1 can be allotted to Barstow, California, at the petitioner's suggested transmitter site, located 8.3 kilometers northwest [3] of the community, consistent with the minimum distance separation requirements of the Commission's Rules. Additionally, since Barstow is located within 320 kilometers (199 miles) of the U.S.-Mexico border, concurrence in the allotment by the Mexican government was obtained.

3. In view of the above, we believe the public interest would be served by substituting Channel 240B1 for Channel 240A at Barstow, California, since it would provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the construction permit for Station KXXZ(FM) to specify operation on Channel 240B1, as requested.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Barstow, California	232B1, 240B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit (BPH-851029MI) issued to Hub Broadcasting, Inc. for Station KXXZ(FM), Barstow, California, IS MODIFIED effective **January 3, 1991,** to specify operation on Channel 240B1 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] BARC's late-filed comments have not been accepted for consideration herein in accordance with Section 1.415(d) of the Commission's Rules. Additionally, we note that BARC's comments were not served on the petitioner, and therefore they also violate the Commission's *ex parte* rules. *See* 47 CFR § 1.1200 *et seq.*

[2] In view of the unacceptability of BARC's comments, petitioner's reply thereto is moot and will not be discussed.

[3] Coordinates at the petitioner's suggested site for Station KXXZ(FM) at Barstow are 34-58-15 and 117-02-21.

[4] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-553

In the Matter of

Amendment of Section 73.202(b), RM-7431
Table of Allotments,
FM Broadcast Stations.
(Lynchburg, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 19, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Douglas Broadcasting, Inc. (petitioner), licensee of Station WGOL(FM), Channel 252A, Lynchburg, Virginia, requesting substitution of Channel 250C3 for Channel 252A at Lynchburg and modification of its license to specify operation on the higher class channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 250C3 for Channel 252A at Lynchburg, since it would provide a wide area FM service to the community. An engineering analysis shows that Channel 250C3 can be allotted to Lynchburg in compliance with the Commission's minimum separation requirements.[2] As requested, we shall propose to modify the license of Station WGOL(FM) at Lynchburg to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at Lynchburg.

3. Accordingly, in view of the above, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lynchburg, Virginia	252A,261A, 269A,290A	250C3,261A, 269A,290A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 10, 1991,** and reply comments on or before **January 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner fails to state that it will apply for the channel, if allotted. We will permit petitioner to cure this error in its comments. *See* Paragraph 2 of the Appendix to this *Notice*.

[2] The coordinates for Lynchburg are North Latitude 37-24-54 and West Longitude 79-08-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

RICHARDSON BROADCASTING GROUP	File No. BPH-870824MG
ELIZABETH M. YOUNTS File	No. BPH-870824MH
GREENE BROADCASTING, INC.	File No. BPH-870824MI

For Construction Permit for a
New FM Station, Channel 273A
Southern Pines, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1990; Released: November 21, 1990

By the Review Board: MARINO (Chairman), and BLUMENHTHAL. Board Member ESBENSEN absent.

1. By *Memorandum Opinion and Order*, FCC 92R-102, adopted October 19, 1990 (released October 31, 1990), the Board considered the "Petition for Reconsideration" of Richardson Broadcast Group (RBG), and responsive pleadings, addressed to our *Decision* [1] in the above-captioned case. Now before the Board is RBG's "Reply To Opposition To Petition for Reconsideration," filed October 31, 1990.

2. It appears that the Board's October 19 consideration of RBG's reconsideration petition improvidently truncated the pleading cycle. We have therefore reviewed and considered RBG's reply pleading with an eye toward assessing whether our denial of RBG's request for reconsideration was appropriate.

3. Upon review of RBG's latest pleading, we remain unpersuaded that reconsideration is warranted and that the reasons set forth in our October 19 order denying reconsideration obtain, even after considering RBG's October 31 reply pleading. That is, that RBG's residence claims and broadcast experience do not equal (or outweigh) those of Younts, who has the advantage here.[2] Younts also has a very slight coverage advantage, all of which defeat RBG.[3]

4. ACCORDINGLY, IT IS ORDERED, That the motion for extension of time to file a reply, filed October 19, 1990 by Richardson Broadcasting Group IS GRANTED; and that our *Memorandum Opinion and Order*, FCC 90R-102, released October 31, 1990, IS REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] 5 FCC Rcd 5285 (Rev. Bd. 1990).

[2] We note that the *I. D.*, 4 FCC Rcd 7989 (1989), did not expressly award "community of license" residency status to RBG, but noted its principal's residence "within RBG's proposed 1 mv/m contour," (*I.* D., paras. 35; *Concls.*15). However, we do not strongly disagree with RBG, that the physical distance between Aberdeen and Southern Pines, *standing alone*,would necessarily summon a decisional difference in favor of Younts, and we did not intend to suggest such by our citation to "*see West Michigan Broadcasting Co. v. FCC*,735 F.2d 601 (D.C. Cir. 1984)." On the other hand, we believe that Younts' residence in Southern Pines since 1947, and her history of broadcasting in that community spanning a period of four decades (1940's-1980's), outweighs RBG's entitlement, albeit that RBG's credentials in this regard are quite respectable as well. RBG has made much more of the physical distance, per se, than did the Board.

[3] Upon review of the ALJ's award of a "very slight preference" to Younts over RBG, *I.D.*,para. 18) we found no basis upon which to boost meaningfully the coverage preferences described in the *I.D.*Again, Younts' relative preference here, *standing alone*,might be (as suggested by the ALJ) no more than a tie-breaker. But Younts has other advantages as well, however discretely modest.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 26, 1990

Released: November 19, 1990

Channel One Communications, Inc., 8940PUH
Debtor-in-Possession
222 S. Central Avenue
Clayton, Missouri 63105

River City Television Partners, L.P.
1215 Cole Street
St. Louis, Missouri 63106

Dear Applicants:

This letter is in reference to your application (BALH-900731GN) seeking Commission's consent to the assignment of the license of station KSTZ(FM), Ste. Genevieve, Missouri, from Channel One Communications, Inc., Debtor-in-Possession (Channel) to River City Television Partners, L.P. (River City).

River City is the licensee of station KDNLTV channel 30 (IND), St. Louis, Missouri. Although, the predicted Grade A contour of station KDNL-TV does not encompass Ste. Genevieve, Missouri, the 1 mV/m contour of KSTZ(FM) does encompass St. Louis, Missouri. Section 73.3555(b)(2) of the Commission's rules generally provides that televison/radio combinations cannot be created where the 1 mV/m contour of the FM station encompasses the city of license of the television station. Accordingly, River City has requested a waiver of the rule. In support of its waiver request, River City correctly notes that Arbitron ranks St. Louis, Missouri as the 18th largest market. Also, River City submits that there will be 49 separately owned broadcast voices in that market after the proposed purchase has been consummated.

In *Amendment of Section 73.3555, 4 F.C.C. Rcd. 1741, reconsidered in part,* 4 F.C.C. Rcd. 6489 (1989), we set out standards for reviewing requests for waivers of the rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more separately owned, operated, and controlled voices would remain after the proposed assignment. Second, we stated that we would look favorably upon requests involving "failed stations" that have not been operated for a substantial period of time or that are involved in bankruptcy proceedings. 4 F.C.C. Rcd. at 1751. Because St. Louis is the 18th largest market, and because, as appropriately demonstrated by River City, there will be more than 30 separately controlled voices in that market after the proposed assignment, River City meets the first standard.[1] Accordingly, its request for waiver of Section 73.3555(b)(2) is granted.

We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the application (BALH-900731GN) is granted, effective on the date of adoption of this letter. This letter was adopted by the Commission on October 26, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Although River City also contends that it meets the "failed station" standard, we need not address this contention since we have found that it has met the "top 25 market/30 voices" standard.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-305

In re Applications of

AUDREY R. MORRIS	File No. BPH-880630ME
MGR LIMITED PARTNERSHIP	File No. BPH-880630NO
CAROLINA COMMUNICATIONS V LIMITED PARTNERSHIP	File No. BPH-880630NU

For Construction Permit for
New FM Station, Channel 262A,
Pawley's Island, South Carolina

ORDER

Adopted: November 9, 1990; Released: November 21, 1990

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On September 26, 1990, Audrey R. Morris (Morris) filed an appeal with the Review Board pertaining to the Presiding Judge's rulings on her claims of privilege. Subsequently, by motion filed October 24, 1990, Morris requested that we stay action on the pending appeal, reciting that the parties have reached an agreement in principle for settling this case, which, if approved, would moot the appeal. Good cause having been shown, we will grant the requested relief and defer action on the appeal pending resolution of the proposed settlement agreement.

2. ACCORDINGLY, IT IS ORDERED, That the Motion for Stay, filed October 24, 1990, by Audrey R. Morris IS GRANTED; and that action on Morris' appeal, filed September 26, 1990, and resubmitted on September 28, 1990, IS DEFERRED until further order.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET
COMMUNICAITONS
SERVICES, INC.
Complainant,

v. File No. E-89-38

US WEST, INC.
Defendant.

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: November 9, 1990; Released: November 19, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 2, 1988, Allnet Communication Services, Inc. (hereinafter "Allnet") filed the above-captioned formal complaint against US West, Inc. and its operating subsidiaries Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (hereinafter collectively referred to as "US West"). The complaint contains five counts of allegations that US West's billing and collection rates for switched access service purchased by Allnet during the period from October 1, 1985 through December 31, 1986 were in violation of Sections 201(b) and 202(a) of the Act. In accordance with Commission rules governing formal complaint proceedings, US West filed answers to the complaints.

2. The parties to the above-captioned complaint have conducted discussions with respect to these allegations. As a result of these negotiations, a mutually agreeable settlement between the parties was reached regarding allegations in Counts 1 and 3 that US West's access charges were unlawful. On June 13, 1990, Allnet filed a motion seeking dismissal of Counts 1 and 3 of the complaint without prejudice. However, following discussions with Enforcement Division staff, the parties agreed to accept dismissal of these counts with prejudice. We are satisfied that dismissal of these two counts will serve the public interest by eliminating the need for unnecessary litigation and expenditure of time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion to dismiss Counts 1 and 3 of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED, that Counts 1 and 3 of the above-captioned complaint ARE DISMISSED with prejudice.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-554

In the Matter of

Amendment of Section 73.202(b), RM-7442
Table of Allotments,
FM Broadcast Stations.
(Littlefield, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Stebbins Broadcasting Company (petitioner), permittee of Station KXDM, Channel 238A, Littlefield, Texas, requesting the substitution of Channel 238C3 for Channel 238A at Littlefield.[1] Petitioner claims that the substitution would provide improved service to Littlefield.

2. A Commission engineering analysis indicates that Channel 238C3 can be allotted to Littlefield at petitioner's present construction permit site in compliance with the Commission's minimum distance separation requirements.[2] We also propose to modify Station KXDM's construction permit to specify the new channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 238C3 at Littlefield or require petitioner to demonstrate the availability of an additional equivalent class channel.

3. We believe the public interest would be served by proposing the allotment of Channel 238C3 to Littlefield, Texas, since it would allow Station KXDM to provide wider coverage to this community. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Littlefield, Texas	238A	238C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1991,** and reply comments on or before **January 28, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Janet L. Stebbins
Dave C. Stebbins
Stebbins Broadcasting Company
Box 192
Littlefield, Texas 79339
(Petitioners)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner failed to state that it would apply for a license to operate a station on Channel 238C3, if allotted, and is expected to do so in comments. *See* Paragraph 2 of the Appendix to this *Notice.*

[2] Proposed coordinates for Channel 238C3 at Littlefield are 33-56-17 and 102-20-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-555

In the Matter of

Amendment of Section 73.202(b), RM-7453
Table of Allotments,
FM Broadcast Stations.
(Mineral Wells and Winters, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 1, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Jerry Snyder and Associates, Inc. (petitioner), licensee of Station KYXS(FM), Channel 240A, Mineral Wells, Texas, requesting that the Commission substitute Channel 240C1 for 240A at Mineral Wells and modify its license to specify operation on the higher class channel. Petitioner also requests that the Commission substitute Channel 241A for Channel 240A at Winters, Texas to accommodate its proposal.[1] Petitioner states that it will apply for Channel 240C1 at Mineral Wells, if allotted.

2. A staff engineering analysis shows that Channel 240C1 can be allotted to Mineral Wells in compliance with the Commission's minimum distance separation requirements at the site selected by petitioner.[2] This analysis also shows that Channel 241A can be allotted to Winters.[3]

3. We believe the public interest would be served by proposing the allotment of Channel 240C1 at Mineral Wells, Texas, and Channel 241A at Winters, Texas, because this proposal could provide Mineral Wells with a wide area FM service. We also propose to modify the license of Station KYXS(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Mineral Wells. Since Winters is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government will be requested.

4. Accordingly, for the reasons stated above, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Mineral Wells, Texas	240A	240C1
Winters, Texas	240A	241A

5. Accordingly, IT IS ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making* to the applicant for Channel 240A at Winters, as follows: AFM Associates, P.O. Box 736, Myrtle Beach, South Carolina 29577.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 11, 1991,** and reply comments on or before **January 28, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert W. Healy, Esq.
Reddy, Begley & Martin
2033 M. Street, N.W.
Suite 500
Washington, D.C. 20036
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 240A at Winters is currently vacant. An application (ARN-881209MK) for the channel was filed by AFM Associates but was returned by the Commission. A petition for reconsideration of that action has been filed. If reconsideration is granted, the applicant will be permitted to specify operation on Channel 241A without loss of cut-off status, since no upgrade in class of channel will result from the change. We will serve AFM Associates with a copy of this *Notice*.

[2] Coordinates for Channel 240C1 at Mineral Wells are North Latitude 32-41-06 and West Longitude 98-09-32.

[3] Coordinates for Channel 241A at Winters are North Latitude 31-57-36 and West Longitude 99-57-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-568

In the Matter of

Amendment of Section 73.202(b), RM-7476
Table of Allotments,
FM Broadcast Stations.
(Barbourville, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. Barbourville Community Broadcasting Company (petitioner), licensee of Station WYWY(FM), Channel 241A,[1] Barbourville, Kentucky, requests the substitution of Channel 241C3 for Channel 241A at Barbourville, Kentucky, and modification of its license for Station WYWY(FM) to specify operation on the higher powered channel.

2. We believe petitioner's proposal warrants consideration because the proposal could provide Barbourville with an expanded coverage area FM service. An engineering analysis has determined that Channel 241C3 can be substituted for Channel 241A at Barbourville in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.7 miles) west,[2] in order to avoid a short-spacing to Station WMXK-FM, Channel 240A, Morristown, Tennessee.

3. As requested, we shall propose to modify the license of Station WYWY(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 241C3 at Barbourville, or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Barbourville, Kentucky	241A	241C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 11, 1991,** and reply comments on or before **January 28, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John B. Kenkel
Kenkel & Associates
1220 19th Street, N.W.
Suite 202
Washington, D.C. 20036
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] WYWY(FM) currently operates on Channel 228A at Barbourville, Kentucky. Its license was modified by *Report and Order* in MM Docket No. 87-494, 5 FCC Rcd _____ (1990) (released September 28, 1990), to specify operation on Channel 241A, in order to allow the substitution of Channel 228C2 for Channel 228A at Big Stone Gap, Virginia.

[2] The coordinates for Channel 241C3 at Barbourville are North Latitude 36-52-32 and West Longitude 83-55-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-569

In the Matter of

Amendment of Section 73.202(b), RM-7510
Table of Allotments,
FM Broadcast Stations.
(Gluckstadt and Collins,
Mississippi)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 31, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Exchequer Communications, Inc. (petitioner), requesting the substitution of Channel 269C3 for Channel 269A at Gluckstadt, Mississippi. Petitioner also requests modification of its license for Station WLIN to specify operation on the higher class channel. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution could provide Gluckstadt with a wide coverage area FM service. Petitioner notes that Channel 269C3 can be allotted to Gluckstadt, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 296A is substituted for 269A at Collins, Mississippi.[1] Channel 269A at Collins is presently licensed to Station WKNZ.[2] Petitioner has proposed the substitution of FM Channel 296A for Channel 269A at Collins. The proposed substitution at Collins can be accomplished in compliance with the minimum distance separation requirements at the current site for Station WKNZ. [3] We shall propose to modify the license of Station WLIN, Channel 269A, to specify operation on FM Channel 269C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station WKNZ for the reasonable costs in changing frequency.

4. In view of the above, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Gluckstadt, Mississippi	269A	269C3
Collins, Mississippi	269A	296A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Covington County Broadcasters, Inc., the licensee of Station WKNZ, Collins, Mississippi, Shall Show Cause why its license should not be modified to specify operations on Channel 296A in lieu of Channel 269A.

6. Pursuant to Section 1.87 of the Commission's Rules, Covington County Broadcasters, Inc., may, not later than **January 11, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Covington County Broadcasters, Inc., to furnish additional information. If Covington County Broadcasters, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Covington County Broadcasters, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public's interest.

7. IT IS FURTHERED ORDERED, That the Secretary of the Commission, SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Covington County Broadcasters, Inc.
Route 3, Box 171A, Highway 49 North
Hattiesburg, Mississippi 39402

Southern Air Communications, Inc.
Highway 49 North
Hattiesburg, Mississippi 39402

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **January 11, 1991,** and reply comments on or before **January 28, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis J. Kelly
Cordon and Kelly
1920 N Street, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 269C3 at Gluckstadt are 32-25-36 and 90-12-19.

[2] Station WKNZ is the subject of a pending application for assignment from Covington County Broadcasters, Inc., to Southern Air Communications.

[3] The coordinates for Channel 296A at Collins are 31-31-49 and 89-30-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-316

In the Matter of

Amendment of Section 73.202(b), RM-6709
Table of Allotments,
FM Broadcast Stations.
(Morristown, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 5, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Four Seasons Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5611 (1989), proposing the allotment of Channel 275A to Morristown, New York, as the community's first local FM service. Petitioner and The Wireless Works ("Wireless"), licensee of Station WSLB(FM), Ogdensburg, New York, filed comments. Petitioner filed reply comments.

2. Petitioner, in its comments, reiterates its intention to apply for Channel 275A, if allotted to Morristown. Wireless opposes such an allotment. Wireless does not address the issue of whether the public interest would be served by allotting a first local channel to the community. Rather, it questions petitioner's intention to apply for the channel, if allotted. Wireless states that Timothy Martz ("Martz") is the sole officer, director and 90% shareholder of Four Seasons Communications, Inc. It submits that the petitioner has been involved in rule making proceedings to allot channels to at least 17 communities and if all were allotted, could not honor his commitment to apply for each channel without violating the Commission's multiple ownership rules. It argues that processing these petitions for which he cannot file may have delayed other pending rule making proposals advanced by other parties. Wireless additionally questions petitioner's commitment to apply for Channel 275A, if allotted to Morristown, stating that Martz has previously failed to file applications for channels allotted at his request in a number of instances and one such allotment remains unapplied for by any party. According to Wireless, Martz is also an applicant for a number of FM translator stations. It contends that these applications violate Section 74.1232 of the Commission's rules, which states that a translator station will not be granted to an applicant who is the licensee or permittee of an FM broadcast station where the translator is located beyond the predicted 1 mV/m contour of the primary station and within the predicted 1 mV/m contour of another FM station. Therefore, it requests that this proceeding be held in abeyance pending an inquiry into whether Martz's petition in this proceeding is *bona fide*, whether Martz is financially qualified to follow through on his stated intention to apply for all the requested channels and whether Martz is violating the Commission's translator rules.

3. In response, petitioner notes that Wireless does not in any way address the issue of whether the public interest would be served by the allotment of an FM channel to Morristown. Rather, it states that the pleading is nothing more than an unsupported attack on the character qualifications of Martz. Petitioner contends that Wireless's pleading is based on its desire to maintain the monopoly on radio broadcasting in the Morristown area that it now enjoys. It argues that character and financial qualification issues are inappropriate at the rule making stage, citing *Laurel, Mississippi, et al.*, 12 R.R. 1515 (1955), *Redding, California*, 21 R.R. 1506 (1960), and *Sioux Center, Iowa*, 26 FCC 2d 168 (1970). Petitioner again reiterates its intention to apply for the channel, if allotted to Morristown. Petitioner avers that every statement of intent to apply was based on a genuine intention to do so. It points out, however, that there is no Commission rule that requires that a petitioner, having made such a good faith representation, actually file for the allotment during the window period. As to the seventeen rule making proceedings listed by Wireless as being initiated at petitioner's request, it acknowledges that it did not file an application for all of the communities. It states that one request was dismissed by the Commission after finding that Owls Head was not a community for allotment purposes, and three are still pending. Of the remaining 13, either Martz or entities in which he is involved have filed applications in 6 cases and received construction permits in four of those cases: one application was dismissed pursuant to a settlement agreement, and one application remains pending. In one instance, Martz's partner in Four Seasons filed one of the two applications received. In five cases, Martz did not file an application during the window period based on subsequent information indicating that other parties were intending to file and the belief of petitioner that he could not prevail in a comparative hearing because he could claim no integration and holds other broadcast interests. In fact, all but one of the communities where a channel was allotted at Martz's request have been applied for by interested parties, if not Martz himself.

4. Based upon a careful review of the pleadings before us, we believe the public interest would be served by allotting Channel 275A to Morristown, New York, as the community's first local FM service. We find that the arguments advanced by Wireless are without merit. No argument has been presented that would lead us to believe that the public interest would not be served by allotting Morristown its first local FM channel. Petitioner has stated and restated its intention to apply for the channel, if allotted, and Wireless has not presented sufficient evidence to find that petitioner's statement is not *bona fide*. Although Martz may have been involved in seventeen separate rule makings over a period of years seeking the allotment of FM channels, the Commission's multiple ownership rules would not bar him from effectuating his intent to apply for the allotment because he presently has on file fewer than a total of 14 petitions and/or applications for full service stations. In this connection, the petitioner is correct that there is no Commission rule that requires a petitioner to honor its commitment to file an application for a channel that it has requested. However, we would like to caution prospective petitioners against filing petitions for allotments

where no genuine interest exists. Should a pattern of such action be found, the Commission could institute an investigation to determine whether an abuse of the agency's processes had occurred or disregard the petitioner's expression of interest. In this case, however, the petitioner has provided a detailed and adequate explanation of those instances in which Martz's stated intention to file an application for a channel was not effectuated. We also find it inappropriate to require the petitioner to demonstrate here its financial ability to construct the Morristown station. Rather, this issue is more appropriately raised in connection with an actual application. Finally, any impropriety that Wireless believes may exist in petitioner's applications for FM translator stations also is more appropriately addressed in connection with the grant or denial of the individual applications.

5. Channel 275A can be allotted to Morristown in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence has been received since Morristown is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Morristown, New York	275A

7. The window period for filing applications will open on **January 7, 1991,** and close on **February 6, 1991.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-35-18 and West Longitude 75-39-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

SDCEA, Inc. File No. W-P-C-6486

To lease transmission facilities to provide centralized equal access service to interexchange carriers in the State of South Dakota.

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: November 9, 1990; Released: November 21, 1990

By the Chief, Domestic Facilities Division:

1. SDCEA, Inc. (SDCEA or Applicant), a South Dakota corporation, has filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934 (the Act), 47 U.S.C. § 214 and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01. SDCEA seeks authority to lease and operate transmission and switching facilities for the purpose of providing centralized equal access services to bring the benefits of equal access for interstate and intrastate competitive services to the subscribers of twelve independent local exchange telephone companies (ITCs) which serve seventy-six rural exchanges in the state of South Dakota. Comments were filed by Brookings Area (Brookings, South Dakota) Chamber of Commerce (BACC), American Telephone and Telegraph Company (AT&T) and Northwestern Bell Telephone Company (NWB), a subsidiary of U S West Communications. Applicant replied to the comments.

Application

2. Applicant is wholly owned by South Dakota Network, Inc. (SDN), also a South Dakota corporation. SDN, in turn, is owned by twelve ITCs which operate in the state of South Dakota. (A list of the ITCs was supplied in SDCEA's application.) SDCEA explains that ownership in SDN has been made available to all ITCs in the state of South Dakota. Applicant says that the stock distribution is based upon a formula consisting of the access lines and minutes of use of the participants relative to the project as a whole. SDCEA notes that the access lines currently covered by the project account for approximately 50% of all ITC access lines in the state of South Dakota.

3. SDCEA states that, geographically, the project covers the majority of ITC-served territory in the eastern portion of South Dakota and that future participation of ITCs not currently participating in its project is likely. SDCEA states that the project contemplates the provision of equal access, through a centralized equal access tandem to seventy-six rural exchanges serving approximately 37,067 access lines. Applicant states that no equal access capabilities currently exist in these exchanges and no requests for that service have been received by any of the participating ITCs, from competitive interexchange carriers.

4. Applicant explains that the leased facilities which are covered by its application will consist of DS-1 digital channels, provided via fiber optic cable, and a digital access tandem switch which will provide both equal access features and traffic aggregation in Sioux Falls, South Dakota. SDCEA maintains it will lease these facilities from its parent corporation, SDN. Applicant states that its network is designed to rely upon ITC fiber optic transport facilities, where possible, in order to provide the most efficient trunking arrangements, and to reduce the amount of leased facilities. According to SDCEA, SDN may also lease available capacity to interexchange carriers (IXCs) desiring to locate their points of presence (POPs) away from the centralized equal access switch in Sioux Falls, although the applicant will offer such IXCs co-location opportunities at its switch. In addition to the offering of available capacity to IXCs as described, Applicant states that SDN will pursue opportunities to provide competitive, interexchange services to subscribers in South Dakota and thus, SDN may become an equal access customer of SDCEA. SDCEA declares that its network collects and delivers participating ITC traffic at the local exchange company level and in most cases, this traffic is already aggregated at the tandem level (for originating traffic) and it thus represents the most efficient network configuration for providing equal access to the seventy-six rural exchanges to be served by the project.

5. SDCEA contends that it is aware that AT&T has a POP facility in Aberdeen, South Dakota through which the proposed network will pass. Applicant states it will accommodate AT&T, if it desires, by allowing access to the proposed network at AT&T's POP in Aberdeen. SDCEA says that although AT&T also maintains a POP facility in Sioux Falls, this alternative interconnection point should minimize, if not eliminate, any dislocation AT&T might otherwise experience given the necessity that originating and terminating toll traffic to and from its participating ITC exchanges transit the Sioux Falls access tandem for ticketing and related functions. Applicant maintains that it is aware of no other interexchange carrier POPs along the route of its planned network. If such POP facilities currently exist, however, SDCEA assures that it would interconnect those carriers on the same basis as AT&T's Aberdeen location.

6. Applicant relates that it will offer feature groups A, B, and D switched access through its centralized equal access tandem, pursuant to its access tariff to be filed with the Commission. SDCEA says that it also expects to provide a number of other services from its centralized equal access tandem including recording, 800 access, WATS and WATS-type services and future network access services (such as signalling system 7 services) as the public switched network evolves.

7. SDCEA claims the public interest requires a grant of the requested authorization as the Commission has recognized on several occasions that centralized equal access is likely to bring about interstate, interexchange carrier competition far sooner in certain areas served by ITCs, than if those ITC offices were converted to equal access capability on an individual basis. Applicant stresses that the public convenience and necessity is clearly served by the competitive and efficiency factors which are produced by such networks, citing *Memorandum Opinion, Order and Certificate (Indiana Switch Access Division)*, Mimeo No. 3652, released April 10, 1986, File No. W-P-C-5671 at ¶ 23, *aff'd on recon.*, 1 FCC Rcd. 634 (1986); *Memorandum*

Opinion, Order and Certificate (Iowa Network Access Division) 3 FCC Rcd. 1468 (Common Carrier Bureau 1988) at ¶¶ 22-23, *aff'd on recon.*, 4 FCC Rcd 2201 (Common Carrier Bureau 1989); *Memorandum Opinion, Order and Certificate (Contel of Indiana, Inc.)* 3 FCC Rcd. 4298 (Common Carrier Bureau 1988) at ¶¶ 25-27.

8. Applicant asserts that, like the above-mentioned centralized equal access projects approved by the Commission, the project proposed in its application will also serve the public interest. For example, SDCEA states that the project will bring the benefits of equal access, including presubscription, to more than 37,000 rural subscribers. These subscribers, in all likelihood, would never enjoy the benefits of the Commission's policies favoring interstate interexchange carrier competition were the Commission to rely upon conversion at the individual ITC end office level to produce such competition, according to Applicant. SDCEA states that the fact that the average number of access lines per exchange to be served by the project amounts to only 488 access lines, strongly supports such a conclusion. Applicant states the instant equal access project also relies upon the most efficient mix of its facilities and those provided by the participating ITCs to carry the equal access traffic. Applicant reports that it will lease facilities from its separate corporate parent, SDN, (as opposed to the use of different divisions within the same corporate entity), in order to meet regulatory concerns relative to the potential cross-subsidy of nonregulated operations; it will also voluntarily submit semi-annual reports detailing the amount of capacity leased from SDN, and used by itself. Additionally, continues Applicant, the project will result in realizing the same benefits for intrastate services since intrastate equal access is also a goal to be achieved by the project. Finally, states SDCEA, the project will result in the realization of network efficiencies to interexchange carriers, ITCs, and ultimately consumers, given the efficiency-enhancing benefits which the Commission previously has found to accrue as a result of providing equal access on a centralized basis.

9. SDCEA submits that it will become a carrier subject to Section 214 of the Act as a result of the lease of the transmission facilities covered by its application from its affiliate SDN, which may engage in the provision of interstate interexchange carrier services. *See Iowa Network Access Division* at ¶ 9 note 12; *Contel of Indiana* at ¶¶ 8-10. Applicant says that SDN will be subject to forborne regulation for its interstate activities as is set forth in the Commission's *Fifth Report and Order* in CC Docket no. 79-252, 98 F.C.C. 2d 1191, 1200 (1984). SDCEA states that, along with SDN, it will fully abide by the conditions set forth in that order which define the circumstances under which local exchange company affiliates may qualify for nondominant, forborne regulatory treatment of their interstate, interexchange carrier operations. Applicant emphasizes that it will abide by all applicable FCC accounting requirements.

10. SDCEA maintains it will offer access service to all IXCs that is equal in type and quality to that offered to AT&T, including presubscription and access signaling to nonpresubscribed carriers via dialing a minimum number of digits. *MTS / WATS Market Structure (Phase III Order* 100 F.C.C. 2d 851, 875-878 (1985). Applicant says the centralized equal access tandem will also provide screening and related functions for WATS and WATS-type services provided by IXCs.

11. Applicant appends a forecast of its 1991 revenue requirements and access rates to its application and relates that it will supply cost support information pursuant to Part 61 of the Commission's rules upon the filing of its interstate access tariff. Applicant submits it will adhere to all applicable FCC accounting requirements, and will maintain separate books of account from its parent, SDN, and from its participating ITCs. In conclusion, SDCEA submits that this application demonstrates that its proposal to provide centralized equal access to twelve ITCs serving approximately fifty percent of the total ITC access lines in the state of South Dakota is both justified in terms of economic benefits and the public need and that no significant interexchange carrier competition exists in the rural areas covered by the project; no equal access capability exists in these areas; and no competitive interexchange carriers are likely to order equal access service unless the traffic of these ITCs serving 76 rural end offices is aggregated at its centralized equal access tandem in Sioux Falls, South Dakota.

Comments

12. BACC states that it strongly supports the application of SDCEA and that at the present time, competitive long distance service is not available within the City of Brookings. BACC states that it believes that Applicant's proposal will bring competitive long distance service to its community at an early date and by aggregating the interstate long distance traffic of all of the companies participating in SDCEA at a switch in Sioux Falls, it will create the equivalent of a 37,000 access line "exchange" for alternative long distance carriers to serve. BACC concludes that it believes that this size "exchange" will attract alternative long distance providers.

13. AT&T, in its comments, emphasizes that it supports the efforts of ITCs to promote the reasonable availability of equal access and interexchange carrier competition for their subscribers. AT&T notes that SDCEA's application is similar to the centralized access plans filed by Indiana Switch Access Division (Indiana Switch), Iowa Network Access Division (Iowa Access), and Minnesota Independent Equal Access Corporation. As in those plans, AT&T notes, SDCEA proposes to provide fiber optic facilities and a digital access tandem switch which will offer equal access features to rural subscribers not currently served by equal access end offices. However, AT&T submits, although SDCEA's plan contains significant improvements over both the Indiana Switch and Iowa Access plans, the application lacks crucial information needed by the Commission to determine whether the proposed plan serves the public interest.

14. AT&T contends that, specifically, it is critical for IXCs and their customers that the proposed access arrangement provide technical features and capabilities normally associated with full equal access. AT&T alleges that SDCEA's application, however, does not contain sufficient information to enable the Commission or interested parties to determine the extent to which the proposed new access arrangements might affect IXC switched services. For example, says AT&T, the application does not indicate whether all features typically available under Feature Group D access (*e. g.*, "10XXX" dialing) would be uniformly available, whether end users would continue to have unencumbered access to AT&T's operator services and international network, and whether end users would

be subject to additional post-dialing delay as a result of the proposed centralized equal access arrangement. AT&T remarks that in the Iowa Access proceeding, the Commission conditioned approval of Iowa Access' Section 214 application on Iowa Access' supplying in its interstate tariff "final information" regarding technical characteristics of its switch and certification of any effects of its proposed network upon access to international and operator services. AT&T declares that any approval of SDCEA's application should be subject to the same condition. Additionally, AT&T states that consistent with the Commission's decisions in the Indiana Switch and Iowa Switch proceedings, other issues involving possible discrimination and cross subsidization, as well as issues concerning rate structure and methodology, will be addressed by AT&T, as appropriate, when SDCEA files its interstate access tariff.

15. NWB states that it does not specifically oppose SDCEA's application in so far as it purports to seek authority to lease and operate facilities to offer Centralized Equal Access (CEA) capabilities and other services to ITCs in South Dakota. However, NWB notes that SDN estimates that 51% of the traffic that will traverse the network will be intrastate in nature. NWB asserts that because the boundaries of the State of South Dakota and the South Dakota LATA are identical (or very largely so), the vast majority of that traffic, if not all of it, will be intraLATA traffic. As such, NWB emphasizes that any action by the Commission should not preempt state regulatory prerogatives regarding Applicant's proposal.

16. NWB notes that pursuant to its existing contractual arrangements with ITCs, it is currently the "1+" intraLATA toll carrier in South Dakota. Accordingly, NWB says, toll traffic destined for an end user in an exchange served by one of the ITC owners of SDN is today routed through one of NWB's two access tandem switches serving the South Dakota LATA. NWB maintains that, although left unstated in the application, it appears that SDN intends to require termination of all such traffic via its CEA tandem located in Sioux Falls. In other words, according to NWB, it appears that the application contemplates NWB's mandatory use of SDN's network, with concomitant abandonment of NWB's existing network for termination of NWB's intraLATA toll traffic.

17. NWB reports that it would object to such a requirement because it would eliminate its ability to choose to terminate its traffic via its own existing facilities. NWB suggests that the Commission should not allow the Section 214 process to be used to change its existing rights and that the Commission should rule that interexchange carriers have the right to terminate traffic over any available facilities. NWB submits that where the toll carrier chooses to terminate such traffic via NWB's existing facilities, SDN should not be permitted to require mandatory transport of that traffic through its Sioux Falls tandem or to access a transport charge to backhaul the traffic to the original NWB toll center for completion. NWB reiterates that it does not object to SDN's provision of CEA capabilities to ITCs, however, equal access, by its very nature, is an originating service. As such, continues NWB, the provision of CEA services does not entitle SDN to force NWB (and other toll carriers) to abandon existing facilities, or unnecessarily increase the costs of using existing facilities, to terminate its own traffic.

18. NWB urges the Commission to require SDN to supplement its application to clarify (1) with respect to traffic destined for SDN exchanges, whether termination via SDN's CEA tandem or via the transport facilities of SDN or the participating ITC will be mandatory; (2) whether the existing connections between SDN exchanges and NWB will be left in place; and (3) whether the use of SDN's network or the transport facilities of SDN participants will be required for the provision of non-CEA service, such as private line service.

Reply

19. SDCEA notes at the outset that neither AT&T nor NWB opposes a grant of its requested authority to lease and operate facilities to provide centralized equal access services to ITCs within the state of South Dakota, and that AT&T's comments characterize SDCEA's centralized equal access project as containing "significant improvements over both the Indiana Switch and Iowa Access Plans . . . ." Reply at p. 2. With reference to AT&T's request that the Commission condition grant of the requested authority upon SDCEA's production of information on the technical characteristics of its equal access service during the tariff review process, SDCEA states that it does not object to providing the technical data which AT&T has requested as part of the tariff review process. SDCEA explains that it is in the process of selecting a switch vendor, and expects to have the requested information available by the time its interstate tariff is filed. This procedure, according to SDCEA, has been followed in the past by the Commission, citing *Iowa Network Access Division*, and *Contel of Indiana, Inc.*, and it foresees no difficulty in supplying the information in this manner. SDCEA states that it has every reason to expect that its centralized equal access offering will be found by the Bureau to be entirely consistent with the equal access obligations applicable to ITCs, as were those of previous applicants, citing *Memorandum Opinion and Order* (Contel Service Corporation revision to Tariff FCC No. 1), 4 FCC Rcd 2565, 2566 (Common Carrier Bureau 1989); *Order* (Iowa Network Access Division Tariff FCC no. 1), 4 FCC Rcd 3947 (Common Carrier Bureau 1989).

20. With reference to NWB's comment that the Commission not "prejudge" or "preempt" state regulatory issues, SDCEA emphasizes that it has not requested that the Commission approve its application in a manner that would, in fact, "prejudge" or "preempt" state regulatory authority, nor indeed has NWB provided any basis for its fear that such a result is likely.

21. Moreover, SDCEA states that, with reference to NWB's argument that it should be able to compete with SDCEA for traffic terminating to SDCEA's participating telephone company exchanges, the Commission considered and rejected precisely this same argument by NWB in *Iowa Network Access Division* stating that:

> The second aspect of mandatory use concerns terminating toll traffic. INAD's proposal to require that terminating toll traffic use the Des Moines tandem would eliminate the possibility of competition in terminating interstate traffic, which NWB is capable of performing by routing calls from its own tandems direct to INAD exchanges. We do not believe that the mandatory termination requirement for interstate traffic is unreasonable or differs substantially

from the normal way access is provided, as both an originating and terminating service by the local exchange company. Given the expected benefits of the network and the fact that independent companies are not subject to MFJ requirements that they allow the interexchange carrier to choose the point of connection, the requirement that terminating interstate traffic transit the Des Moines switch does not appear to be unlawful or unreasonable.

Iowa Network Access Division, 3 FCC Rcd. at 1473 .

22. SDCEA states that, as the Commission is well aware, terminating interstate traffic does not "belong" to NWB. SDCEA continues by saying that if, on the other hand, NWB is complaining about intrastate traffic, that traffic would be subject to the jurisdiction of the South Dakota Public Utilities Commission whose jurisdiction NWB has already asked the Commission not to preempt. SDCEA concludes that NWB's contention that it should be able to compete with SDCEA for terminating traffic into ITC exchanges and its related claim that it has a "right" to such traffic, is inconsistent with Commission precedent.

23. Further, SDCEA argues that NWB's contention that a "clarification" is necessary because SDCEA may have proposed to provide private line services is also without merit. Applicant states that its application does not contain such a proposal and is limited to the provision of switched services, as is clear from a reading of the application and its exhibits. SDCEA insists that, contrary to NWB's assertions, no clarifying supplements to the application are necessary, since it is clear from the face of the application that SDCEA does not propose to provide private line service on a centralized basis.

Conclusion

24. The issues raised by AT&T and NWB have previously been addressed by the Commission and the Common Carrier Bureau. As was the case in *Iowa Network Access Division*, SDCEA's proposed network has the potential for implementing in rural areas (here rural South Dakota) the important Commission goal of making available more competitive, varied, high quality interstate services. Based on the information provided by SDCEA in support of its application, it appears that leasing and operating transmission and switching facilities for the purpose of providing centralized equal access services to bring the benefits of equal access for interstate and intrastate competitive services to the subscribers of twelve independent local exchange telephone companies which serve seventy-six rural exchanges in the state of South Dakota is in the public interest. We will, therefore, grant its application. In doing so, we reject NWB's argument that it should be able to compete with SDCEA for traffic terminating at SDCEA's participating telephone company exchanges, for the same reasons stated by the Bureau in *Iowa Network Access Division*. *See* para. 21, *supra*. However, as the Bureau did in *Iowa Network Access Division*, we will require that SDCEA provide in the interstate tariff proceeding full information on the technical characteristics and identity of its switch, including reliable measurements of post-dialing delay and certification of any effects of the network upon access to international and operator services. Finally, although it goes without saying, this action does not preempt any state orders relating to intrastate traffic. In fact, as was done in similar cases, cited *supra*, we will condition the authorization on receipt of appropriate state approvals.

25. Accordingly, *IT IS CERTIFIED*, that the public convenience and necessity does require and will require the leasing and operation of the facilities specifically proposed in Application File No. W-P-C-6486. Therefore, *IT IS ORDERED*, that SDCEA *IS HEREBY AUTHORIZED* to lease and operate the facilities as proposed in the captioned application.

26. *IT IS FURTHER ORDERED*, that grant of the application provided for herein *IS* SUBJECT TO THE FOLLOWING CONDITION:

That the South Dakota Public Utilities Commission or other state agency has issued any necessary approvals relating to the subject application, without requiring modifications that materially affect the relative amounts of inter and intrastate usage of the proposed system or other representations made in the application.

27. This order is issued under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291 and under *Subdelegations of Authority*,85 F.C.C. 2d 1021 (1981), and is effective upon its release. Failure of SDCEA to decline this authorization as conditioned within thirty-one days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-542

In the Matter of

Amendment of Section 73.202(b),	RM-6462
Table of Allotments,	RM-6682
FM Broadcast Stations.	
(Lebanon, Molalla and Tillamook, Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 5, 1990; Released: November 21, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Spotlight Media Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7072 (1988), proposing the substitution of Channel 279C for Channel 279C1 at Lebanon, Oregon, and the modification of its license for Station KIQY to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[2] P-N-P Broadcasting, Inc., on behalf of Erasmo Carbajal and Cliff Zauner ("Carbajal and Zauner"), filed a counterproposal requesting the allotment of Channel 281A to Molalla, Oregon, as the community's first local FM service. To accommodate the allotment at Molalla, Carbajal and Zauner also request the substitution of Channel 282C2 for Channel 281C2 at Tillamook, Oregon, and the modification of Station KTIL-FM's license accordingly. [3]

2. We believe the public interest would be served by substituting Channel 279C for Channel 279C1 at Lebanon, Oregon, since it could provide the community with a wider coverage area FM service. Channel 279C can be allotted to Lebanon in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) southwest of the community to accommodate petitioner's desired transmitter site.[4] As proposed, we will also modify petitioner's license for Station KIQY to specify operation on Channel 279C in lieu of its present Channel 279C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lebanon, Oregon	279C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Spotlight Media Corporation, for Station KIQY, Lebanon, Oregon, IS MODIFIED to specify operation on Channel 279C, in lieu of Channel 279C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the counterproposal of Carbajal and Zauner (RM-6682) IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Molalla and Tillamook have been added to the caption.

[2] Petitioner failed to file its expression of continuing interest in initial comments, as required by paragraph 2 of the Appendix to the *Notice*, but did file an expression in reply comments. In light of the withdrawal of Carbajal and Zauner's counterproposal, we consider this proceeding to be unopposed and thus will accept its expression of continuing interest, although untimely filed. *See Weston and Webster Springs, West Virginia*, 5 FCC Rcd 1006 (1990), *Vancouver, Washington; Coos Bay and Corvallis, Oregon*, 4 FCC Rcd 839 (1989).

[3] Public Notice of the counterproposal was given on March 1, 1989, Report No. 1768. However, after the record closed, Carbahal and Zauner withdrew their counterproposal for Channel 281A at Molalla and no other party expressed an intention to apply for the channel, if allotted. As stated in the *Notice* and the Appendix thereto, a channel will not be allotted absent an expression of continuing interest. Therefore, we will not discuss the counterproposal or pleadings responsive to it, and the counterproposal will be dismissed.

Westfir Broadcasters Company ("Westfir") also filed a counterproposal seeking the allotment of Channel 282C2 to Westfir, Oregon. However, Westfir failed to serve a copy of its counterproposal on the petitioner and thus the pleading violates the Commission's *ex parte* rules. Therefore, the request will not be considered.

[4] The coordinates for Channel 279C at Lebanon are North Latitude 44-30-17 and West Longitude 122-57-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-566

In the Matter of

Amendment of Section 73.202(b), RM-7421
Table of Allotments,
FM Broadcast Stations.
(Petal and Newton, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1990; Released: November 21, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission is a petition for rule making filed jointly by Thomas William Hickman, III ("Hickman"), licensee of Station WMFM(FM), Petal, Mississippi, and Newton Broadcasting Company, Inc. ("NBCI"), licensee of Station WMYQ(FM), Newton, Mississippi. Hickman requests the substitution of Channel 292C3 for Channel 292A at Petal, Mississippi, and modification of the license for Station WMFM(FM) accordingly. NBCI proposed the substitution of FM Channel 250A for Channel 292A at Newton, Mississippi, and modification of its license for Station WMYQ(FM) to specify operation on Channel 250A.

2. In support of the proposal, petitioners state that the substitution of channels at Petal and Newton will permit improved service by both stations to their respective communities. They further state that because both stations presently operate on Channel 292A, neither can operate at 6kW nor upgrade to a higher class. However, if Channel 250A is substituted for Channel 292A at Newton, enabling Station WMYQ(FM) to operate at 6kW, Station WMFM(FM), could then upgrade from Channel 292A to Channel 292C3.

3. We believe the public interest would be served by the proposed substitutions because they would result in the provision of expanded service to Petal and Newton. Channel 292C3 can be allotted to Petal, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by Hickman.[1] The allotment at Petal currently conflicts with the site specified in the construction permit for Station WRZH(FM), Channel 292A, Picayune, Mississippi, and the licensed site of Station WGUD-FM, Channel 292A, Pascagoula, Mississippi. The authorization for each channel was modified in previous proceedings, and the substituted channels are fully spaced to Hickman's proposal.[2] Therefore, issuance of a license for Channel 292C3 at Petal would be contingent on the licensing of Station WZRH, Picayune, on Channel 291C2 and Station WGUD, Pascagoula, on Channel 290C3. The allotment of Channel 292C3 at Petal also conflicts with an application filed by Hap-Hazard Broadcasting Company for Channel 291C3 at Chatom, Alabama (File No. 900314MM). Channel 292C3 does not conflict with the reference coordinates of the Chatom allotment, nor with the other two applicants for the Chatom allotment. In the event that we allot Channel 292C3 to Petal, Hap-Hazard Broadcasting Company will be permitted to amend its application to specify a non short-spaced site without loss of cut-off protection. Channel 250A can be allotted to Newton, Mississippi, in compliance with the Commission's spacing requirements at NBCI's present site. [3] The substitution of Channel 250A for 292A at Newton could enable Station WMYQ(FM) to increase its operation to 6kW and thus expand its coverage area. Therefore, we shall propose to modify the license of Station WMYQ(FM) at Newton, Mississippi, to specify operation on Channel 250A.

4. We shall propose to modify the license of Station WMFM(FM), Petal, Mississippi, to specify operation on Channel 292C3, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest.

5. Accordingly, for the reasons stated above, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Petal, Mississippi	292A	292C3
Newton, Mississippi	292A	250A

6. IT IS FURTHERED ORDERED, That the Secretary of the Commission Shall Send By Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making* to the following applicant for Channel 291C3 at Chatom, Alabama:

Hap-Hazard Broadcasting Company
P.O. Box 1479
Cross City, Florida 32628

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 14, 1991,** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas William Hickman III
Station WMFM
2571 Old Richton Road
Petal, Mississippi
39465

Newton Broadcasting
Company, Inc.
Station WMYQ(FM)
Highway 80 West
Quitman, Mississippi
39355

Paul Reynolds
415 North College Street
Greenville, Alabama 36037
(Consultant to the petitioners)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 292C3 at Petal are 31-32-00 and 89-10-44.

[2] The license for Station WGUD-FM, Pascagoula, was modified in MM Docket No. 86-55 to specify operation on Channel 290C3. *See*4 FCC Rcd 7556 (1989). The license for Station WZRH(FM), Picayune, was modified in MM Docket No. 86-443 to specify operation on Channel 291C2. *See* 4 FCC Rcd 4519 (1989).

[3] The coordinates for Channel 250A are 32-19-46 and 89-10-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-490

In the Matter of

Amendment of Section 73.202(b),	RM-6751
Table of Allotments,	RM-7184
FM Broadcast Stations.	
(Hilo and Kealakekua, Hawaii)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 5, 1990; Released: November 21, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Kona Broadcasting Systems, Inc. ("Kona"), licensee of Station KOAS(FM), Channel 221A, Kealakekua, Hawaii, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7967 (1989), proposing the substitution of Channel 241C for Channel 221A at Kealakekua, Hawaii, and the modification of its license for Station KOAS(FM) to specify operation on the higher class channel. J. Boyd Ingram ("Ingram") filed a petition seeking the allotment of Channel 240C2 to Hilo, Hawaii, as that community's sixth local FM service. Ingram states that he will apply for the channel, if allotted. We have treated that petition as a counterproposal in this proceeding.[1] Kona filed comments restating its intention to apply for the channel, if allotted. Mount Wilson FM Broadcasters, Inc. ("Mount Wilson"), licensee of Station KRTR(FM), Channel 242C, Kailua, Hawaii, and Kona filed reply comments.[2] No other expressions of interest were received for Channel 241C at Kealakekua.

2. Mount Wilson states that it operates FM Translator Station K288CS, serving Kawaihae, and the translator receives its input power from Station KRTR which operates on the first adjacent channel to Kona's proposed Channel 241C. Mount Wilson notes that the Commission's Rules prohibit an FM translator from receiving its input signal from anything other than off-the-air reception, and the presence of a 100 kW first adjacent channel signal would cause irreparable harm to Mount Wilson's translator operation. Mount Wilson claims that there are a number of other alternative channels that Kona could use to upgrade Station KOAS to a full Class C that would not interfere with the off-air reception of KRTR by Translator Station K288CS.

3. Kona, in reply comments, argues that Mount Wilson's translator is a secondary service that is not entitled to any protection. Kona claims that there are alternative ways for Mount Wilson to continue its present operation without modification of its proposal. For example, Kona argues, Mount Wilson could use a highly selective receiving system at the input of its FM translator so that it can distinguish between Channel 241C and Channel 242C. Kona also claims that Mount Wilson could establish a second translator which receives an off-the-air signal from KRTR from a new location not affected by the operation of Channel 241C, and then retransmit the signal to its translator on a new frequency that can be received by the existing translator. Kona maintains that both solutions are relatively inexpensive and will allow continued operation of the translator.

4. Ingram's counterproposal seeking the allotment of Channel 240C2 to Hilo, Hawaii, as that community's sixth local FM service is mutually exclusive with the proposed substitution of Channel 241C for Channel 221A at Kealakekua, Hawaii. A Commission engineering analysis has determined that this conflict can be eliminated by the substitution of Channel 268C, instead of Channel 241C, at Kealakekua. This would permit the allotment of Channel 240C2 to Hilo. This substitution will be made solely to accommodate the Hilo allotment. The Commission does not protect FM translators, as translators are secondary services. *See* Section 74.1203 of the Commission's Rules.

5. We believe the public interest would best be served by allotting Channel 240C2 to Hilo, Hawaii, and by substituting Channel 268C for Channel 221A at Kealakekua, Hawaii. This would provide an expanded coverage area FM service to Kealakekua and a sixth local FM service to Hilo. As requested we will modify the license for Station KOAS to specify operation on Channel 268C, in accordance with Section 1.420(g) of the Commission's Rules. An engineering analysis confirms that Channel 240C2 [3] can be allotted to Hilo in compliance with the Commission's minimum distance separation requirements, and Channel 268C[4] can be substituted for Channel 221A at Kealakekua in compliance with the Commission's minimum distance separation requirements, at the site proposed in the *Notice* for Channel 241C.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hilo, Hawaii	224C1, 234C1, 240C2, 246C2, 250C2, 262C1
Kealakekua, Hawaii	268C

7. The window period for filing applications for Channel 240C2 at Hilo, Hawaii, will open on **January 8, 1991,** and close on **February 7, 1991.**

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KOAS(FM), Kealakekua, Hawaii, IS MODIFIED, to specify operation on Channel 268C in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[2] Mount Wilson's comments were filed during the reply comment period and, therefore, will be treated as reply comments. Mount Wilson also filed supplemental comments after the close of the reply comment period. In accordance with Section 1.415(d) of the Commission's Rules, Mount Wilson's late filed pleading has not been accepted for consideration.

[3] The coordinates for Channel 240C2 at at Hilo are North Latitude 19-43-30 and West Longitude 155-05-24.

[4] The coordinates for Channel 268C at Kealakekua are North Latitude 19-43-07 and West Longitude 155-54-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TAFT
BROADCASTING
COMPANY AND
NORTHERN
NEW ENGLAND
TELEVISION
(Transferors)

and File No. BTCCT-900426KG

HERITAGE
MEDIA CORPORATION
(Transferee)

For Transfer of Control of Station
WNNE(TV), Hartford, Vermont

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1990; Released: November 19, 1990

By the Commission

1. The Commission has before it for consideration: (1) the above-captioned application for consent to the transfer of control of WNNE-TV, Inc., licensee of station WNNE(TV), channel 31 (NBC), Hartford, Vermont, from Taft Broadcasting Company and Northern New England Television (jointly referred to as Taft) to Heritage Media Corporation (Heritage); (2) a petition to deny the transfer of control application filed by Citadel Communications Company, Ltd. (Citadel), licensee of station WVNY-TV, channel 22 (ABC), Burlington, Vermont; and (3) related pleadings. The ownership of WNNE(TV) by Heritage will result in the overlap of the predicted Grade B contour of that station with the predicted Grade B contour of commonly owned station WPTZ(TV), channel 5 (NBC), North Pole, New York, in a manner inconsistent with Section 73.3555(a)(3) of the Commission's Rules, which generally proscribes common ownership of two television stations whose Grade B contours overlap. However, Heritage proposes to operate WNNE(TV) "primarily as a satellite" of WPTZ(TV) and requests that the transfer of control application be granted pursuant to the exception for satellite operations set forth in Note 5 to the Commission's multiple ownership rule, Section 73.3555.[1]

2. In support of its request, Heritage maintains that the overlap area in this case is *de minimis* because the Green Mountain Range, which separates WNNE(TV) in Hartford from WPTZ(TV) in North Pole, reduces the amount of overlap between the two stations. Using the standard prediction method in Section 73.684 of our Rules, it claims that the overlap area would encompass 934 square miles and a population of 73,205 persons (26,300 television households), representing 9.2 percent of WNNE(TV)'s Grade B contour (12.9 percent of the population) and 5.6 percent of WPTZ(TV)'s Grade B contour (8.6 percent of the population). When the terrain is considered, Heritage asserts, the area of overlap is only 178 square miles, with a population of 7,116 persons, representing 1.8 percent of WNNE(TV)'s grade B contour (0.8 percent of the population) and only 1 percent of WPTZ(TV)'s Grade B contour (1.3 percent of the population). Thus, Heritage argues that the amount of overlap of the Grade B contours of the stations is minimal and is consistent with commission's grant of satellite operations, citing *Central Minnesota Television, Inc.*, 64 RR2d 36(1987); *Pete Stathakas*, 59 RR2d 169 (1985); and *John McCutcheon*, 4 FCC Rcd 2079 (1989).

3. Additionally, Heritage maintains that satellite operation is warranted because the Hartford community cannot support a full-service stand-alone television station. First, it notes that Hartford is a rural, mountainous community with a population of 7,963 persons located on the periphery of the Burlington-Plattsburgh ADI, the 92nd largest market (202,400 television households).[2] Secondly, Heritage asserts, the Hartford area is economically depressed and is currently undergoing a recession. It maintains that the preceding nine months have been the worst for the area, as evidenced by the status of the region's financial institutions, and the record number of bankruptcies filed in the state.[3] Heritage maintains that economic conditions in the Hartford area are likely to remain dismal due to the astronomical levels of indebtedness faced by the area's businesses.

4. Moreover, Heritage states that WNNE(TV) is one of only three commercial broadcast television stations licensed in the State of Vermont, and is the only station providing local programming to Hartford. Further, Heritage asserts, WNNE(TV) provides the only network service to a substantial portion of its Grade B contour.[4] Presently, Heritage avers, approximately 60 percent of the area (174,848 persons) within WNNE(TV)'s Grade A contour is not covered by the Grade A contour of any other commercial television station. Thus, it claims that the Hartford area is underserved, and that a grant of the instant satellite request is necessary to maintain the provision of Grade A service and local television service to the Hartford community. Additionally, Heritage asserts, a grant of its request would result in an insignificant amount of program duplication given the small amount of overlap between the two stations, and would prevent the spectrum allocated to channel 31 from lying fallow and unutilized. Since WNNE(TV) and WPTZ(TV) are both NBC affiliates, Heritage states, satellite operation of WNNE(TV) would allow the station to continue to provide the Hartford community with that network's programming in addition to the local news and public affairs programming currently provided. In fact, Heritage avers, local news will increase because it anticipates adding a local weekend newscast to its schedule. Without satellite operation, Heritage claims, WNNE(TV) will be forced to cease operation and to file for bankruptcy because the Hartford area is unable to support a stand-alone station. Heritage contends that the inability of WNNE(TV) to continue to operate as a stand-alone operation would result in the loss of Hartford's only outlet for local programming because no other stand-alone station will be able to replace the station due to its location and the limited economic resources of the community.

5. Taft asserts that WNNE(TV) has a history of operating losses, and was struggling to remain on the air even before the onset of the economic recession now plaguing New England. It maintains that WNNE(TV) has suffered annual losses since 1981 ranging from $301,000 to $670,000, and that the station's total losses for that period have exceeded $6 million. Taft notes that while the station generated a positive cash flow in each of the last two years from sales and other income as compared with the cost of sales and operating expenses, it states that when interest on outstanding debt and other properly allocated management expenses are taken into account, there was a negative cash flow in 1989 of $158,000 and in 1988 of $515,000. Moreover, it projects that operating losses for 1990 will be approximately $302,000. Additionally, Taft claims that even if this transaction is approved, Taft Broadcasting, the parent of the licensee, will have to absorb over $2 million in losses.

6. Further, Taft states, WNNE-TV's management has historically operated under a tight budget, allowing only for the expenditures necessary to cover the costs of keeping the station on the air. When budgetary measures proved insufficient, Taft asserts, management initiated varied efforts to cut costs and increase profitability.[5] Despite these efforts, Taft states, WNNE(TV) has been operating with substantial losses because the station has been unable to attract national sponsors for its programming. Taft claims that national sales agencies do not recognize WNNE(TV) as a valuable advertising candidate because the station's limited coverage area, which is divided between the Boston and Burlington-Plattsburgh market, is too small and insignificant in comparison to the other stations in those markets. It claims that the station's efforts to increase revenues are further exacerbated by the heavy cable penetration in the area (56 percent).

7. Additionally, Taft alleges, television stations across the New England region have experienced a substantial decrease in revenues because of the recession and that several stations have been forced to go dark. In this regard, it states that WNHT(TV), channel 21, Concord, New Hampshire, has been dark since March 31,1989, and that channel 32, which is allocated to Greenfield, Massachusetts, an area within WNNE-TV's Grade B contour, is dark.[6] In 1989, Taft asserts, New England was the only region in the country in which broadcast television stations consistently experienced decreased revenues (an average of 2 percent) across the board. It states that WNNE(TV)'s revenues have decreased over the past 2 years, and it projects that revenues will decrease approximately 21 percent by the end of 1990. Taft claims that recent rating reports demonstrate that WNNE(TV)'s current circulation and audience ratings are so low that, even with modest to substantial improvement, the station will never generate sufficient revenues to offset its operating expenses. In this regard, it states that the November 1989 and February 1990 Arbitron audience estimates show that WNNE(TV) had a one rating and a three share of viewers from sign-on to sign-off. Additionally, Taft asserts, according to Arbitron's February 1990 audience estimate, the station has a weekly circulation of 42,000 television households, compared to 223,000 for WCAX-TV, Burlington, Vermont; 173,000 for WPTZ(TV), North Pole, New York; and 138,000 for WVNY-TV, Burlington, Vermont.

8. Further, concerning its efforts to sell the station, Taft states, WNNE(TV)'s dismal financial condition and the economic condition of the New England area has made the station an unattractive risk to potential buyers. Taft claims that after hiring three brokers and sending information regarding WNNE(TV) directly to several parties throughout the country over the course of two years, the only serious offer for WNNE(TV) originated from Heritage. It maintains that Heritage is the only party that has come forward with a viable offer to operate the station in a manner that will serve the public and comply with the Commission's policy and precedent. Taft argues that this lack of interest in the station demonstrates that absent a grant of the instant request, WNNE(TV) will go dark leaving the Hartford area without any local service and causing another allocated frequency to lie fallow.

Pleadings

9. *The Petition.* In its pleadings, Citadel asserts that contrary to Heritage's statements, the Burlington-Plattsburgh market is not unserved or underserved as a total of ten stations (including WNNE(TV)) serve the market. *See Mary R. Kupris*, 5 FCC Rcd 3828 (1990), *recon. dismissed*, 5 FCC Rcd 5142 (1990), *appeal pending sub nom.* WLOS TV, Inc. v. FCC, No. 90-1251 (D.C. Cir. May 14, 1990). It states that while Hartford is a small community, WNNE(TV)'s local market is not. In this regard, Citadel notes that Hartford borders White River Junction, Vermont (location of WNNE(TV)'s main studios); Hanover, New Hampshire (home of Dartmouth College); and Lebanon, New Hampshire (the commercial center of a growing resort area). Moreover, it maintains, WNNE(TV) reaches over 200,000 households and has a larger net weekly (76,000) and average daily (42,000) circulation than many full-service stand-alone television stations.

10. Additionally, Citadel argues that the existence of a potential qualified purchaser who wishes to buy the station and keep it as a full-service facility makes untenable the applicant's claim that the station is not viable. It submitted an affidavit from Elio Betty which states that Betty is interested in acquiring WNNE(TV) and is qualified to do so. Citadel asserts that the Commission has observed that the existence of a buyer willing to operate a station as a full service operation is an important consideration in determining whether the grant of a satellite exception is warranted. *See Central Minnesota Television Co.*, 64 RR2d 36, 38 (1987). Citadel states that the three offers made by Betty to Taft were real and financeable. It claims that Betty had secured preliminary assurances for financing, contingent on the actual terms of the sale, from a commercial bank and from investment bankers who were "enthusiastic" about financing the deal. Citadel maintains that Betty communicated this information to Taft, and that Taft never expressed any doubt as to Betty's ability to obtain financing.[7] Moreover, it states, the fact that Betty's financing was to some extent contingent on the terms of an agreement between Betty and Taft does not undermine the viability of Betty's offers. Further, Citadel asserts, Taft specifically expressed its belief to Betty that WNNE(TV) should remain a stand-alone operation, and that Betty had the experience necessary to preserve the station's integrity and independence.

11. Further, Citadel claims that Heritage's economic showing depicts a financially successful station with good prospects. It states that the applicants manage to present a gloomy picture by presenting net operating results. But a review of the statements submitted, Citadel avers, shows that WNNE(TV)'s history and prospects are bright. In this regard, it states that the financial capability of an enterprise is generally measured by its ability to generate cash flow. It observes that information submitted by the applicants shows that WNNE(TV) has generated positive cash flow for every fiscal year since 1984. In attempting to prove the station's doom, Citadel states, the applicants have included debt service, home office costs, and perhaps non-cash amortization of programming costs as expenses. Therefore, because WNNE(TV) is financially healthy and is capable of surviving on its own, Citadel argues, the applicants cannot show that satellite operation of WNNE(TV) is an economic necessity.

12. Citadel maintains that if WNNE(TV) and WPTZ(TV) are allowed to combine operations, the economic viability of WVNY-TV, which competes with both stations, will be threatened.[8] Despite applicants' claims concerning WNNE(TV)'s performance in the market, Citadel maintains, WNNE(TV)'s ratings are generally not far behind (and sometimes ahead) of WVNY-TV's. Thus, it claims that operation of WNNE(TV) as a satellite station would concentrate economic power in a well functioning market. If the application is granted, Citadel asserts, the combined ratings and audience shares of WPTZ(TV) and WNNE(TV) would make the combination the easy choice for agencies placing national and regional advertising. In fact, Citadel argues, given the market share of the competing stations in the area, it is likely that WVNY-TV will lose advertising revenues in an amount directly proportioned to the amount of revenues that the WPTZ(TV) and WNNE(TV) combination stands to gain. Thus, Citadel contends that the Heritage proposal would give it a "leg-up" on its competitors in Burlington when Heritage already enjoys the enormous competitive benefit of a VHF signal (WPTZ(TV)). Thus, it claims, even if WNNE(TV) were in financial distress, Heritage is not entitled to another advantage. Nor is it relevant, Citadel avers, that Taft may not receive as much for WNNE(TV) from a buyer proposing stand-alone operation as from Heritage. Citing *Kupris*, it states, "the fact that the marketplace causes financial distress for some licensees does not dictate that rules and policies should necessarily be waived in order to assist those licensees."

13. Finally, noting that the Commission has rejected *de minimis* claims where the overlap includes more than one percent of the population in either contour, Citadel maintains that the overlap area in this case is not *de minimis*, citing *Weigel Broadcasting Co.*, 4 FCC Rcd 6200 (1989) *(Weigel); Silver King Broadcasting*, 2 FCC Rcd 324 (1986), *recon. dismissed*, 3 FCC Rcd 6640 (1988) *(Silver King)*.

14. *The Joint Opposition*. The applicants contend that the information submitted regarding the financial problems plaguing WNNE(TV), the depressed economy in the Hartford area, and the unsuccessful efforts to sell the station clearly demonstrate that WNNE(TV) is not viable as a stand-alone station. The applicants maintain that the cash flow figures cited by Citadel are misleading. They claim that, when interest on outstanding debt and all properly allocated management expenses are taken into account, there was a negative cash flow in 1989 of $158,000 and 1988 of $515,000. Concerning the offers of Betty to purchase the station, Taft states that Betty's offers were contingent upon obtaining financing. Therefore, it avers, the offers were not considered as viable because of the difficulties facing all purchasers seeking financing in New England, and because Betty insisted upon the negotiation and execution of a purchase agreement prior to obtaining any commitment for financing. Moreover, Taft asserts, Betty provided no deposit or letter of credit to give substance to his offers, and supplied few details concerning his background, experience, investors, structured plans, and financing. Taft also submitted letters from Betty wherein Betty stressed the difficult economic climate in New England, the difficulties in obtaining financing, and the continuing cash flow problem at the station. As a result of discussions and correspondence with Betty and his representatives, Taft states, it concluded that Betty's offers were speculative and that the necessary financing would never be obtained. Additionally, Taft maintains, because of WNNE(TV)'s continued losses and the deteriorating economy, it could not expend the time, money and energy necessary to confirm the ultimate failure of Betty's offers. Further, the statements by Betty in his letters to, and discussions with Taft, left a clear impression with Taft that Betty, if he were able to finance a purchase, would undertake major reductions in costs (e.g., elimination of local programming) at the station in order to improve cash flow. Moreover, Taft states, Heritage's offer was more certain than Betty's offers and could be consummated more quickly, since it consisted of an exchange of stock and the assumption of certain liabilities, and was not based upon any financing contingency. Since Heritage was a known commodity, Taft contends, it was convinced that Heritage ownership of the station would provide continued jobs for most of the station's employees and would best serve the local community. In this regard, Taft notes that Heritage is committed to maintaining and actually increasing local news and public affairs programming. Taft further asserts, contrary to Citadel's suggestions, this is not a case of a seller accepting a higher offer from an existing broadcaster desiring to operate the station as a satellite because Betty's offer was higher than that of Heritage.

15. In regard to Citadel's assertions that the area is not unserved or underserved, the applicants state that the information set forth in the amendment to the application, demonstrating that 65 percent of the population within WNNE-TV's Grade A contour is not covered by the Grade A contour of any other commercial television station, establishes that the Hartford area is underserved. Further, they maintain, the population figures for White River Junction (2,582), Hanover (9,119) and Lebanon (11,134) show that Hartford is not an urban population center, but rather an area comprised of separate and distinct small towns and cities. However, the applicants assert that the area is populous enough that it deserves local programming and its own television broadcasting voice and that WNNE(TV) offers the only choice for such voice.

16. Concerning the amount of overlap, the applicants argue that Citadel's reliance upon *Weigel* and *Silver King* is misplaced because the cases do not involve a request for satellite exception, but a waiver of the duopoly rule which is subject to a more stringent standard. Even if the more stringent standard is applied to Heritage's proposal, the applicants argue, satellite operation of WNNE(TV) is warranted. They argue that the overlap in *Weigel* and *Silver*

King was greater than the overlap between WNNE(TV) and WPTZ(TV), when terrain obstructions are taken into account. Moreover, the applicants maintain that in both cases the waiver request was granted and the Commission held that while the resulting overlap was not *de minimis*, it was not so large as to require a finding that the stations involved served substantially the same area.

Discussion

17. In challenging the WNNE(TV) assignment application, pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must, as a threshold matter, submit specific allegations of fact sufficient to show that a grant of the application would be *prime facie* inconsistent with the public interest. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Once the pleading standard is satisfied, the Commission must determine whether the record as a whole (*i.e.*, the application, the pleadings, and other matters which may be officially noted) presents a substantial and material question of fact requiring a hearing. *See* Section 309(d)(2). Against this backdrop, we turn to the question to be resolved here; namely, whether the operation of WNNE(TV) as a satellite of WPTZ(TV) is warranted.

18. The goals of our multiple ownership rules are to promote economic competition and diversity of programming viewpoints. *See e.g., Multiple Ownership of Standard, FM and Television Stations*, 45 FCC 1476, 1476-77, recon. denied, 45 FCC 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 of Section 73.3555 of the Rules. What constitutes a sufficient showing for an exception to the duopoly rule for a satellite operation has been established by case law and involves a balance of various factors, including the degree of overlap between the stations, the capacity of the market to support a full-service station, the level of service available in the market, the financial difficulties of the stations involved, as well as other considerations. *See Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, FCC 90-279 (adopted August 1, 1990) paras. 2, 10.

19. On the basis of the information before us, we believe that a sufficient showing has been made to justify a satellite operation in Hartford. Using the standard prediction method, the overlap in this case is not substantial and is clearly within the range we have previously approved for satellite operation.[9] *See, e.g., Family Group V, LTD.*, FCC 90-299, released September 10, 1990. Further, the applicants have submitted information that supports their contention that the Hartford area will not support a stand-alone operation, especially given current market conditions in Hartford. Hartford, located in the 92nd largest television market, is a small town of 7,963 persons. The Hartford area is comprised of separate and distinct small towns and cities. While WNNE(TV) is part of the 92nd television market, the station has been unable to serve most of the market because of its location on the periphery of the market and its relatively small weekly circulation of television households (82,500).[10] The fact that the Hartford area is currently undergoing a recession, the area is experiencing a record number of bankruptcies by area businesses; and that television stations in the market have experienced decreases in revenues, with several having gone off the air, have not been refuted by Citadel.

20. While Citadel notes that WNNE(TV) has generated positive cash flow for every year since 1984, it provides no evidence to refute the legitimacy of the management and debt service expenses listed by Heritage. When these expenses are considered, it appears that the station has been operating with substantial losses. Moreover, to reduce these losses, Taft has attempted to cut costs by reducing the station's staff from forty-five to thirty employees, decreasing the purchase of syndicated programming, and purchasing barter programming. Despite these efforts, WNNE(TV) has been unable to reduce operating losses or to compete effectively with the other stations serving its coverage area for national advertising in order to increase its revenues. Additionally, while the station was offered for sale for a period of two years, only two interested parties presented offers, with Heritage making the only viable offer supported by firm financial commitments, to purchase the station. The absence of viable offers to operate the station on a full-service basis further supports the economic justification for satellite operation. Betty's offers, in contrast, were not supported by a bank letter or letter of credit from any financial institution and were in fact contingent on obtaining financing. The fact that Taft rejected Betty's purchase offers even though they were higher than Heritage's further supports our conclusion that Taft, in fact, based its decision on a legitimate business assessment that Betty's offers were too speculative to be seriously pursued. Under these circumstances, and given the difficulty of obtaining financing generally during the period, we believe Citadel has not raised a substantial and material question that Taft should have considered Betty's offers as viable.

21. We believe that grant of the requested satellite authorization is consistent with the purpose of our satellite policy. First, the overlap between the parent and the proposed satellite is relatively small. *Compare Mary R. Kurpis*, FCC 90-275, released August 13, 1990, *appeal pending sub nom. WLOS TV, Inc. v. FCC*, No. 90-1251 (D.C. Cir.). Moreover, we find pertinent the fact that Hartford receives the Grade B signal of only three commercial stations and one operating noncommercial station. Id.[11] The small size of Hartford, the depressed economy, the financial history of WNNE(TV), as well as the lack of viable interested buyers for the station provides additional support for our action. Other factors reinforce the appropriateness of this judgment. Heritage proposes to continue to provide the Hartford area with the local public affairs programming that is currently broadcast and to increase the station's local news by adding a local weekend newscast. Further, WNNE(TV) is the only station providing local programming to the Hartford area, and it provides the only off-the-air NBC network programming to Hartford and a substantial portion of the WNNE(TV) Grade B service area.[12] Thus, we are persuaded that significant public interest benefits would flow from a grant of the application and that such benefits outweigh any impact on diversity and economic competition.[13]

22. In sum, having considered all the foregoing, we find that the petition to deny and related pleadings filed in this proceeding by Citadel do not raise a substantial and material question that would require a hearing. Thus, we

find that the applicants are fully qualified and that operation of WNNE(TV) primarily as a satellite of WPTZ(TV) would serve the public interest.

23. Accordingly, IT IS ORDERED, That the petition to deny filed by Citadel Communications Company, Ltd. IS DENIED.

24. IT IS FURTHER ORDERED, That the application for consent to the transfer of control of WNNE-TV, Inc., licensee of station WNNE(TV), Hartford, Vermont, from Taft Broadcasting Company and Northern New England Television to Heritage Media Corporation IS GRANTED.

25. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programs but produces less than five percent of its programming locally. *See, e.g., Amaturo Group, Inc.*, 68 FCC2d 899 (1978).

[2] Heritage claims that due to the intervening terrain obstructions and the station's location, WNNE(TV) is unable to provide any coverage to approximately 34 percent of the Burlington-Plattsburgh market. It states that the station's signal does not reach the approximately 90,000 television households located in the more populous northern counties in the market. Heritage claims that while the market has 202,400 television households, WNNE(TV)'s weekly circulation consists of only 42,000 television households.

[3] Heritage states that the Bank of New England, which traditionally has financed the majority of transactions for the Northeastern broadcast market, has suffered losses totalling $2.5 billion; and that the Chittenden Bank, the largest lender in Vermont, recently reported that $8.1 million in commercial loans is uncollectible. Moreover, it avers that in 1985 approximately 180 bankruptcy petitions were filed in the United States bankruptcy court in Rutland, and by 1987 the number had increased 60% to 303, and during the first two months of 1990, 91 such petitions had been filed already.

[4] Four commercial stations serve the Burlington-Plattsburgh ADI: WNNE(TV), channel 31 (NBC), Hartford, Vermont; WPTZ(TV), channel 5 (NBC), North Pole, New York; WCAX-TV, channel 5 (CBS), Burlington, Vermont; and WVNY(TV), channel 22 (ABC), Burlington, Vermont. Six educational stations are licensed to the market: WETK(TV), channel 33, Burlington, Vermont; WVER(TV), channel 28, Rutland, Vermont; WVTB(TV), channel 20, St. Johnsburg, Vermont; WVTA(TV), channel 41, Windsor, Vermont; WLED-TV, channel 49, Littleton, New Hampshire; and WCFE-TV, channel 57, Plattsburg, New York. Of the six noncommercial stations, four are owned by Vermont Educational TV, which duplicates the programming on each of the stations.

[5] These efforts include the hiring of new management personnel, investing in equipment to enhance the quality of the over-the-air signal, increasing news programming, decreasing purchase of syndicated programming, purchasing barter programming, and reducing the staff from forty-five to thirty employees.

[6] In fact, the construction permit for channel 32 was issued to LaQueth Fleming and Gloria Fleming d/b/a Greenfield Television on April 29, 1984, and was cancelled on February 26, 1987, for failure to constuct.

[7] It points out that Tom Hill, Vice-President of Valley Bank and on the Board of Northern New England Television, stated that the Valley Bank would consider 60 to 70 percent financing of the purchase.

[8] Citadel claims that WVNY-TV, which has a troubled history until recently, was purchased by it just before it was to be foreclosed upon by lenders.

[9] White it appears that the terrain between WNNE(TV) and WPTZ(TV) is such that the actual overlap area may be less than that shown utilizing the standard prediction method of Section 73.684 of our Rules, we cannot state that the overlap area will be as small as that shown by the applicants' alternative method.

[10] WNNE-TV's weekly circulation may, as Citadel contends, exceed that of some full-service stations. This fact, however, does not undermine the applicants' contention that WNNE-TV's circulation is relatively low or that this factor, when taken together with other relevant considerations, precludes stand-alone operation under the conditions prevailing in this particular market.

[11] The commercial stations are WCAX-TV, channel 3 (CBS), Burlington, Vermont; WMTW-TV, channel 8 (ABC), Portland, Maine; and WMUR-TV, channel 9 (ABC), Manchester, New Hampshire. The noncommercial station is WVTA(TV), channel 41, Windsor, Vermont. Noncommercial station WHED-TV, channel 15, Hanover, New Hampshire, also places a Grade B contour over Hartford, but WHED-TV has been off the air for a considerable period of time due to financial difficulties.

[12] The applicants have not provided a figure for the area within the Grade B contour of WNNE-(TV) for which the station provides the only NBC service. However, the applicants did provide figures for the area within the Grade A contour.

[13] As noted, Citadel asserts that approval of the application will enhance Heritage's competitive position in the Burlington-Plattsburgh market and cause WVNY-TV to lose advertising revenues. It is not the purpose of the Act to protect licensees from competition. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1040). Further, while the *Carroll* doctrine has been eliminated (*see Report and Order in MM Docket 87-68*, 3 FCC Rcd 638 (1988)), even if it were still applied in Commission proceedings and were properly applicable in this context, Citadel has not met the heavy burden of pleading to establish that authorization of satellite operation here would result in a net degradation of service. *See also Arnold L. Chase*, 5 FCC Rcd 1642, 1645 (1990) (Competitive effect of creating a TV/radio combination on another area broadcast licensee found not relevant to the decision).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-567

In the Matter of

Amendment of Section 73.202(b), RM-7468
Table of Allotments,
FM Broadcast Stations.
(Marquette, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1990; Released: November 21, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for rule making is a petition filed by Iron Mountain-Kingsford Broadcasting Company ("Petitioner"), requesting the allotment of FM Channel 231A to Marquette, Michigan, as that community's third FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated its intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 231A can be allotted to Marquette, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Marquette is located within 320 kilometers of the U.S. - Canadian border, concurrence of the Canadian government will be requested.

3. In view of the fact that the proposed allotment could provide a third FM broadcast service to Marquette, Michigan, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Marquette, Michigan	239C1, 277C1	231A, 239C1, 277C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 14, 1991** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas G. Shack, Jr.
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 231A are 46-33-00 and 87-23-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-423

In the Matter of

Amendment of Section 73.202(b), RM-6878
Table of Allotments,
FM Broadcast Stations.
(Riviera Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 5, 1990; Released: November 21, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Lappin Communications-Florida, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7085 (1989), proposing the substitution of Channel 232C3 for Channel 232A at Riviera Beach, Florida, and the modification of its license for Station WMXQ(FM) to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. Gilmore Broadcasting Corporation, licensee of FM Station WLVE, Miami Beach, Florida, filed late supplemental comments.[1]

2. We believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Riviera Beach, Florida, since it could provide the area with an expanded FM service. Channel 232C3 can be allotted to Riviera Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.4 kilometers (8.3 miles) north.[2] The site restriction is necessary in order to avoid a short-spacing to a construction permit for Station WCVU(FM), Channel 233C, Naples, Florida. In accordance with Section 1.420(g) of the Commission's Rules, as requested we are herein modifying the license of Station WMXQ to specify operation on Channel 232C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Riviera Beach, Florida	232C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMXQ(FM), Riviera Beach, Florida, IS MODIFIED, to specify operation on Channel 232C3 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Here, Gilmore Broadcasting Corporation comments were filed February 12, 1990, long after December 5, 1989, the last day for filing comments or replies in this proceeding. The late filed pleading has not been accepted for consideration herein in accordance with Section 1.415(d) of the Commission's Rules.

[2] The coordinates for Channel 232C3 at Riviera are North Latitude 26-54-21 and West Longitude 80-03-42. Because the petition that resulted in this allotment was filed prior to October 2, 1989, the Riviera Beach licensee may avail itself of the provisions of Section 73.213(c)(i) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ESCOTEL CELLULAR IC-89-06015

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 1, 1990; Released: November 20, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 29, 1989, Mr. Vincent T. Tucker (complainant)[1] filed an informal complaint with the Commission pursuant to Section 208 of the Communications Act (Act), 47 U.S.C. § 208, and Section 1.711 of the Commission's rules, 47 C.F.R. § 1.711, against Escotel Cellular (Escotel). Complainant alleges unfair business practices used by Escotel to obtain a payment totally unrelated to the complainant, and its principals and agents.

2. The Informal Complaints Branch (Branch) of the Common Carrier Bureau sent a Notice of Informal Complaint (Notice) directing Escotel to investigate the complaint. Escotel has failed to respond to the Notice as required by Section 1.717 of the rules.[2] Based on the facts set forth below, we conclude that Escotel has willfully and repeatedly violated Section 1.717 and Section 416(c) of the Act, 47 U.S.C. § 416(c), [3] and is apparently liable for a monetary forfeiture penalty pursuant to Section 503(b) of the Act.[4]

3. On August 2, 1989, the Branch sent the Notice to Escotel on behalf of the complainant directing the carrier to investigate the issues raised in the complaint and to report the results of its investigations to the Branch no later than September 1, 1989. Escotel failed to respond to the the Branch's Notice as required by the Notice and Section 1.717. The Branch also sent letters to Escotel via certified mail reciting Escotel's obligation to respond to the Commission's Notice.[5] The certified letters directed Escotel to respond within fifteen days.

The certified letters stated in pertinent part:

> Failure of any person to answer any lawful Commission inquiry is considered a misdemeanor punishable by a fine under Section 409(m) of the Act and [Section] 312(b) [of the Act] provides the Commission with authority to order any person to cease and desist from any violation of a rule, regulation or order of the Commission. Further, failure to comply with an order of the Commission can result in prosecution under Section 401(b) of the Act. Sections 501 and 503(b)(1)(B) provide for forfeiture penalties against any person who willfully fails to follow the directives of the Act or a Commission order.

Escotel has failed to respond to the Notice or letters.

4. Under Section 503(b) of the Act, the Commission is empowered to impose a forfeiture against a person or corporation who has repeatedly failed to comply with any order issued by the Commission under the Act. The record indicates that Escotel has willfully and repeatedly violated Section 1.717 of the Commission's rules and Section 416(c) of the Act by failing to respond to Commission Notices and letters. Each failure constitutes a separate violation. Each day that a violation continues is considered a separate offense. Based on the circumstances in this case, the Bureau finds a reasonable basis to order a $1,000 forfeiture for Escotel's failure to respond to the Notice of Informal Complaint. Further, it is appropriate to assess a $1,000 forfeiture for each of the two discrete offenses of not responding to the two certified letters forwarded to Escotel and received by its representatives.

5. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act and authority delegated in Section 0.291 of the Commission's rules, that Escotel Cellular is apparently liable for a forfeiture in the amount of $3,000 for its willful and repeated violations of Section 1.717 of the Commission's rules and Section 416(c) of the Act by failing to respond to the Commission's orders.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, that Escotel shall, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, PAY THE FULL AMOUNT OF THE FORFEITURE OR FILE A RESPONSE showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced.[6]

7. IT IS FURTHER ORDERED that Escotel shall, within 30 days of the release date of this Notice of Apparent Liability for Forfeiture, file a written investigation report responding to the informal complaint cited above in accordance with 47 C.F.R. § 1.717.

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Escotel Cellular.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Complainant is President of the Doyle Agency, Inc. in Fairfield, Connecticut.

[2] Section 1.717 provides:

> [t]he Commission will forward informal complaints to the appropriate carrier for investigation. The carrier will, within such time as may be prescribed, advise the Commission in writing, with a copy to the complainant, of its satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's report or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a complaint proceed-

ing to be closed, without response to the complainant. In all other cases, the Commission will contact the complainant regarding its review and disposition of the matters raised. If the complainant is not satisfied by the carrier's response and the Commission's disposition, the complainant may file a formal complaint in accordance with § 1.721 [of the rules].

47 C.F.R. § 1.717.

[3] Section 416(c) requires compliance with Commission orders so long as they remain in effect.

[4] 47 U.S.C. § 503(b). Until December 19, 1989, Section 503(b) provided in pertinent part:

> Any person who is determined by the Commission . . . to have . . . willfully or repeatedly failed to comply with any of the provisions of this Act or any rule, regulation, or order issued by the Commission under this Act . . . shall be liable to the United States for a forfeiture penalty.
>
> (2) The amount of any forfeiture penalty determined under this subsection shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice or the notice of apparent liability issued under this subsection, shall not exceed--
>
> (A) $20,000, if the violator is (i) a common carrier subject to the provisions of this Act, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or
>
> (B) $5,000, in any case not covered by subparagraph (A). The amount of such forfeiture penalty shall be asessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Effective December 19, 1989, the statute was amended by Public Law Number 101-239 to increase the Commission's forfeiture authority. Section 503(b)(2) now provides:

> (A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount asessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act described in paragraph (1) of this subsection.
>
> (B) If the violator is a common carrier subject to the provisions of this Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.
>
> (C) In any case not covered in subparagraph (A) or (B), the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (1) of this subsection.
>
> (D) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

[5] The certified letters were dated September 20, 1989 and January 26, 1990; Escotel's responses were due October 5, 1989 and February 10, 1990, respectively. Escotel has not responded to either the Notice or certified letters. The certified receipts were signed by representatives of the company.

[6] Such a forfeiture amount shall be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, FCC, Box 19209, Washington, D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C. 20554.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION,
SATELLITE
BUSINESS SYSTEMS,
WESTERN UNION
INTERNATIONAL, INC.
Complainants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-420
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-421
PACIFIC NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-422

Defendants.

ORDER

Adopted: November 13, 1990; Released: November 20, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, MCI Telecommunications Corporation, Satellite Business Systems and Western Union International Inc. (hereinafter the "Complainants") filed the above-captioned formal complaints against The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwestern Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On October 15, 1990, however, Complainants filed a motion for dismissal of the complaints with prejudice stating that the parties had reached an agreement and that, as a result, the complaints had become moot.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Complainants' Motion for Dismissal of Complaint IS GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE &
WIRELESS
COMMUNICATIONS,
INC.,
Complainant,

v.

GTE
CALIFORNIA
INCORPORATED
Defendant.

File No. E-90-438

ORDER

Adopted: November 13, 1990; Released: November 20, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 5, 1990, Cable & Wireless Communications, Inc. (hereinafter "CWC") filed the above-captioned formal complaint against GTE California, Incorporated (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On October 2, 1990, however, CWC filed a motion for leave to withdraw the complaint because the complaint is erroneously based on a review of a different carrier's final monitoring report and the complaint is based on erroneous grounds.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CWC's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-327

In the Matter of

AT&T COMMUNICATIONS — Transmittal Nos. 2494

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan No. 10

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1990; Released: November 13, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed Transmittal No. 2494 on August 16, 1990. This transmittal introduces AT&T's tenth Competitive Pricing Plan (CPP10) under AT&T Tariff F.C.C. No. 15, scheduled to become effective on November 14, 1990. According to AT&T, CPP10 constitutes a competitive response to an offer made by MCI Telecommunications Inc. (MCI) for provision of telecommunications services to Deluxe Corporation (Deluxe). Petitions against this transmittal were filed by MCI, US Sprint Communications Company Limited Partnership (US Sprint), the Competitive Telecommunications Association (CompTel), and the National Telecommunications Network (NTN).[1] For the reasons discussed below, we suspend Transmittal No. 2494 for the full five-month statutory period.

II. BACKGROUND

2. AT&T contends that this transmittal represents AT&T's competitive response to an offer made by MCI to provide outbound and inbound telecommunications services to Deluxe at rates that are significantly below MCI's tariffed rates. According to AT&T, Deluxe has expressed an intention to switch from AT&T to MCI unless AT&T counters that offer. AT&T Transmittal No. 2494, Description and Justification (D&J) at 1. With CPP10, AT&T proposes to discount Deluxe's monthly bill for Software Defined Network (SDN) Service by 23 percent, and provide a 13.1 percent discount off AT&T's 800 Term Plan-Location and Service Specific and AT&T 800 Customer Specific Term Plan for Megacom 800 Service, Basic 800 Service, and 800 ReadyLine Service.[2] The term for CPP10 would be four years. AT&T Tariff F.C.C. No. 15, Transmittal No. 2494, Section 12.1, 2nd Revised Page 36.

III. PLEADINGS

A. Petitions

3. CompTel, MCI, and NTN incorporate by reference their prior pleadings which fully describe their concerns and which are merely highlighted in the instant petitions. *See* CompTel Petition at 1; MCI Petition at 3; NTN Petition at 2. MCI argues that CPP10 effectively bundles AT&T's Megacom 800 Service with other AT&T voice services to take advantage of AT&T's dominance in the 800 service market. MCI Petition at 3. MCI and NTN contend that this bundling practice has been proscribed by the Commission. *Id.*, citing AT&T Communications, Inc., 5 FCC Rcd 3833 (Com.Car.Bur. 1990); NTN Petition at 3. MCI also argues that the competitive necessity test does not justify AT&T's CPP10 offering because that test applies to services made available to classes of customers and not single customers. *Id.* at 4. MCI disputes AT&T's claim that CPP10 is not limited to Deluxe and therefore is within the competitive necessity doctrine. MCI notes that AT&T's tariff specifies that in order to procure CPP10, a customer must have been actually offered a discount by MCI. Yet, MCI contends, in the same filing AT&T also asserts that MCI's offer has only been made to Deluxe and that AT&T's offer has not been made to any other customer. MCI Petition at 4, citing AT&T D&J at 2, 4, 7, 10, and Tariff 15, Section 2.1.5.A.3. These statements, according to MCI, effectively limit CPP10 to a single customer, Deluxe, thereby placing this offer outside the scope of the competitive necessity test which requires that an offering be made generally available to classes of customers. MCI Petition at 5.

4. The three other petitioners also argue that CPP10 fails to satisfy the competitive necessity test. [3] NTN argues generally that AT&T's claims of competitive necessity are without merit in light of AT&T's market power. NTN Petition at 2. Comptel argues that CPP10 fails the first prong of the competitive necessity test because it offers Deluxe discounts off certain services either "individually or in combination," whereas MCI's offer apparently applies to only a combination of services. According to CompTel, CPP10 thus exceeds the bounds of MCI's offer and consequently does not meet the first prong of the test which requires that a carrier demonstrate that competitive alternatives are equal to or lower than the carrier's offer. CompTel Petition at 3-4.

5. US Sprint argues that CPP10 fails to meet all three prongs of the competitive necessity test. According to US Sprint, the plan fails to meet the first prong of the test because it is not clear whether AT&T's pricing meets or beats MCI's offering to Deluxe. US Sprint Petition at 3-4. US Sprint further argues that CPP10 fails to meet the second prong of the competitive necessity test because it is unduly discriminatory to offer this service to a single customer. *Id.* at 5. US Sprint charges that AT&T's statement that this offering will be available to other customers who have received a substantially similar offer is vague and still discriminatory because it is unlikely that resellers would be allowed by AT&T to take advantage of CPP10. *Id.* at 5-6. The third prong of the competitive necessity test is also not met by AT&T, in US Sprint's view, because AT&T has not demonstrated that CPP10 will be profitable and not burden other ratepayers. *Id.* at 6.

6. Finally, US Sprint charges that CPP10 constitutes an attempt by AT&T to circumvent price cap regulation[4] by offering "nothing more than discounted SDN and 800 service" to Deluxe. *Id.* at 7. US Sprint suggests that the Commisson did not anticipate or consider the consequences of the selective transformation of price capped services into Tariff 15 offerings. *Id.* at 7. US Sprint argues that these transfers will increase the likelihood of cross-subsidization and will seriously compromise an intended benefit of price cap regulation which was to promote lower prices for all consumers. *Id.* at 8-9. The solution, argues US Sprint, is to prohibit Tariff 15 offerings. *Id.* at 9.

B. AT & T Reply

7. AT&T contends that its use of the competitive necessity test is justified and that no petitioner has refuted the factual basis upon which its use of the test is based. AT&T Reply at 1-2. AT&T disputes MCI's claim that CPP10 impermissibly bundles Megacom 800 and SDN by noting that the discount applies to procurement of services individually or in combination. *Id.* at 3-4. Furthermore, AT&T believes that "if MCI's offer is bundled, AT&T's response *a fortiori* 'meets but not beats' that offer, because the price the customer will pay with any service or combination of the services offered by AT&T will be higher than the price the customer would pay for the comparable service or services under MCI's proposal." *Id.* at 4.

8. AT&T contends that the substantive provisions of the Communications Act apply to all carriers and not merely to carriers classified as dominant. *Id.* at 5. AT&T therefore concludes that if single customer pricing is lawful for non-dominant carriers, then it is also lawful for AT&T. *Id.* at 5-6.

IV. DISCUSSION

9. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the prohibition against unreasonable discrimination established by the Communications Act. Yet, as the Commission observed at the time it initiated its investigation of the first Tariff 15 offering, the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[5] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

10. We also conclude that the issues raised by this transmittal warrant exercise of our discretion to suspend the transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs any negative impact the suspension may have upon AT&T. Therefore, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

11. We will incorporate this investigation into the proceeding established in CC Docket No. 90-327. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 2494.

13. IT IS FURTHER ORDERED that this investigation IS INCORPORATED into the proceeding established in CC Docket No. 90-327.

14. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by AT&T Communications ARE SUSPENDED until April 14, 1991.

15. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 90-1137 is assigned for this purpose.

16. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2494 filed by MCI Telecommunications Corporation, National Telecommunications Network, and US Sprint Communications Company Limited Partnership ARE DENIED.

17. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2494 filed by the Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject, filed Aug. 31, 1990 (MCI Petition); US Sprint Petition To Reject, filed Aug. 31, 1990 (US Sprint Petition); CompTel Petition To Reject or, in the Alternative, To Suspend and Investigate, filed Aug. 31, 1990 (CompTel Petition); and Petition To Reject of the National Telecommunications Network, filed Aug. 31, 1990 (NTN Petition). AT&T replied to these petitions on September 10, 1990 (AT&T Reply).

[2] On October 10, 1990, AT&T withdrew the second aspect of this transmittal, which proposed a credit to be applied to the customer's bill if the service date of CPP10 occurred after November 14, 1990. In light of the withdrawal of this provision, we do not need to review questions raised by petitioners regarding its lawfulness.

[3] To justify a discriminatory rate on the grounds of competitive necessity, the carrier must show that:

> 1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering;
>
> 2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and
>
> 3) the volume discount contributes to reasonable rates and efficient services for all users.

Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984).

[4] The Commission's price cap rules are contained in Section 61.41 through Section 61.49 of the Commission's Rules, 47 C.F.R. §§ 61.41 through 61.49.

[5] AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712, 7713 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-86

In re Applications of

GREAT LAKES BROADCASTING, INC.	File No. BPH-870327KA
HURON COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File No. BPH-870331OB
THOMAS W. ROBERTS	File No. BPH-870331PF
NCB ENTERPRISES, INC.	File No. BPH-870410KC
FIRELANDS BROADCASTING CORP.	File No. BPH-870415MO

For Construction Permit for
New FM Station, Channel 241A,
Huron, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1990; Released: November 27, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing a Separate Statement.

1. In an *Initial Decision*, 5 FCC Rcd 2919 (1990) (I.D.), presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) granted the application of Firelands Broadcasting Corp. (Firelands) for a new FM broadcast station at Huron, Ohio. The proceeding is now before the Review Board on exceptions. Two of the applicants filing exceptions, Huron Communications Company Limited Partnership (Huron) and NCB Enterprises, Inc. (NCB), contend that the ALJ erred in denying Huron's petition to enlarge issues filed November 18, 1988, seeking the addition of a site availability issue against Firelands. In addition, NCB (joined by Huron and Firelands) urge that the ALJ erred in denying NCB's petition to enlarge issues seeking the addition of a financial qualifications issue against competing applicant Thomas W. Roberts (Roberts). As indicated below, we remand the case for further hearing of these issues.

FIRELANDS' SITE CERTIFICATION

2. In adopting the site certification form used in Firelands' application, the Commission declared in *Processing of FM and TV Broadcast Applications*, MM Docket No. 84-750, 50 Fed. Reg. 19936, published May 13, 1985, at para. 22 (emphasis added):

> [S]ite availability certification [should] be utilized to deter speculative applications . . . . The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. *A mere possibility that a site will be available is not sufficient. William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). *Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.*

See also 62 Broadcasting, Inc., 4 FCC Rcd 1768, 1771 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 830 (1990). In *Radio Delaware Inc.*, 4 FCC Rcd 8630, 8631 (Rev. Bd. 1989), the Board indicated that:

> It is axiomatic that an applicant must have reasonable assurance of the availability of its proposed transmitter site when it originally files its application. [Multiple citations omitted.] Although reasonable assurance may be acquired in numerous ways, it requires at minimum "a meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988).

See also Elijah Broadcasting Corp., 5 FCC Rcd 5350, 5351 (1990), *aff'g* 3 FCC Rcd 5148 (Rev. Bd. 1988).

3. In its application as originally filed on April 15, 1987, Firelands principal Shelly M. Luipold affirmatively certified that Firelands had "reasonable assurance" that its proposed transmitter site "will be available for the applicant's intended purpose" and that such reasonable assurance was obtained from the owner of the existing tower on the site, Robert Barnes. *See* Firelands Application (FCC Form 301), Section VII. The Engineering Exhibit in Firelands' original application represented that a modest existing tower (56.4 meters; 185 feet) on the proposed site would be *removed* (Engineering Exhibit Exh. E2) and replaced by a new, higher tower (87 meters; 285 feet) on which Firelands' proposed FM antenna would be mounted. The Engineering Exhibit also revealed (emphases added): [1]

> Firelands Broadcasting Corporation proposes to construct a new FM Station, at the existing site of Business Radio Service [Station] KNAB-999. *A new 87 meter AGL tower will be constructed*, and KNAB-999 will be [re]installed on the new facility . . .

* * *

The existing 56. 4 meter tower will be replaced with a 87 meter total height AGL (331 meters AMSL) [*tower*]. The business radio service will coexist on the new tower with channel 241A.

4. However, a letter Luipold wrote to Barnes the same day the Firelands application (and engineering exhibit) were filed reflects that the site owner was not advised that its existing tower would have to be entirely replaced. Specifically, on April 15, 1987, Luipold wrote Barnes (emphases added):

> This letter is to confirm the conversation you had last week with Jay Wagner who requested, on my behalf, *permission to lease space on your tower*. I understand there was a verbal quote of $500 per month for this lease space, should I be successful in obtaining the Huron FM radio license. *If, in studying this proposed tower, my consulting engineer feels any changes need to be made in order to comply with FCC requirements, please know that any cost will be absorbed by the Firelands Broadcasting Corp., and it will not in any way interfere with your use of the tower.*

5. In a subsequent Declaration, dated November 30, 1988, Luipold stated that (emphases added):

> In trying to reach Mr. Barnes by telephone in the days immediately preceding the filing of Fireland's application, it was my intent to confirm his conversation with Mr. Wagner and discuss the possibility of Firelands *raising the height of the tower* at Fireland's expense. When Mr. Barnes did not return my phone calls, I decided, based on Mr. Wagner's conversation with Mr. Barnes, to submit the application, and immediately confirm Fireland's understanding of the tower site arrangement with Mr. Barnes by letter. Based on my belief that Mr. Wagner had obtained assurance from Mr. Barnes for Fireland's use of his existing tower, *I assumed that Mr. Barnes would not object to the construction of a taller tower at the site* since Mr. Barnes would benefit by having a taller tower for his 2-way radio facilities. In addition, I thought Mr. Barnes would also benefit by having additional tower space to lease. The improvements would be made at Fireland's expense at no inconvenience to Mr. Barnes.

6. Additionally, the testimony of Firelands' own witnesses at the hearing confirms the inescapable inference to be drawn from its contemporaneous documents that the site owner was not asked, and did not consent to, the replacement of its existing tower prior to Firelands' certification. Luipold testified that she had asked fellow Firelands principal Wagner "to locate a tower site for me and to get verbal permission to lease space on that tower," and that Wagner subsequently related "that he did have permission from Mr. Barnes to lease space." Tr. 350. Sometime between April 1 and 15, 1987, "after Wagner told [Luipold] about the tower site that he had, [she] made at least two attempts to contact Mr. Barnes, and [Luipold] left [her] name and number, and he did not return [her] call." *Id.*; *see also* Tr. 384. Indeed, Luipold's first contact with Barnes was the April 15, 1987 letter (*see* para. 4, *supra)* she sent to him (Tr. 385), on the same day the Firelands application was filed.

7. Wagner testified at hearing that he made only one telephone call to Barnes, and in that conversation Barnes assured him the site would be available to Firelands. Tr. 481, 500. However, his testimony reveals that he did not discuss with Barnes Firelands' proposal to actually *remove and replace* Barnes' tower (Tr. 484-487; emphases added):

> [NCB Counsel]: Mr. Wagner, did you ever propose to Mrs. Luipold that she authorize you to negotiate for the *replacement* of the Barnes' tower with a taller tower?
>
> [Wagner]: *No, sir.*
>
> * * *
>
> [NCB Counsel]: Do you have any knowledge as to whether Firelands' proposal requires the taking down of the existing Barnes' tower and the erecting of a new tower?
>
> [Wagner]: No.
>
> * * *
>
> [Huron Counsel]: Did you have authority to negotiate with Barnes Nurseries for the *replacement* of their tower with a taller tower?
>
> [Wagner]: *No, sir.*
>
> [Huron Counsel]: Did you ever negotiate, in fact, with Barnes Nurseries concerning *replacement* of their tower site with a taller tower, to your knowledge?
>
> [Wagner]: *No, sir.*

Finally, Wagner testified that he simply "contacted Mr. Barnes . . . at Mrs. Luipold's request, to find out whether or not there *was a position on his tower* and whether or not he would *rent that position* to Mrs. Luipold." Tr. 499; emphases added.

8. A substantial and material question is presented as to whether, prior to Firelands' certification, Barnes gave Wagner a "reasonable assurance" of the replacement of Barnes' existing tower. It is undisputed that Wagner never discussed with Barnes, and Barnes never assented to, the actual proposal contained in Firelands' original application that it totally replace Barnes' tower. Therefore, the record does not reveal any reasonable basis for Firelands' original certification that it had reasonable assurance of the Barnes site "for the intended purpose" or for its purported belief that the site was "suitable and available."

9. It is well-established that "[a]n applicant may not simply 'assume' to [a] site." *Dutchess Communications Corp.*, 101 FCC 2d 243, 253 (Rev. Bd. 1985), citing *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495 (Rev. Bd. 1984). Therefore, a remand is necessary here to explore the accuracy of Firelands original site certification. If Firelands did not, in fact, possess "reasonable assurance" for its original proposal, it also may not rely on its amended site to demonstrate site availability. *62 Broadcasting, supra; Pepper Schultz*,5 FCC Rcd 3273, para. 2 (1990).

ROBERTS FINANCIAL CERTIFICATION

10. On November 15, 1988, NCB filed a "Second Motion to Enlarge Issues" against Roberts, seeking the addition of financial qualifications and false financial certification issues. NCB relied on Roberts' testimony at hearing that, although his financial plan relied upon bank financing to cover between 70% and 80% of his $250,000 estimated cost of construction and initial operation, he had received no written confirmation of bank financing, but instead relied solely on conversation with banking personnel to support his personal belief that he would in the future be able to obtain the necessary bank financing.See Tr. 264-269, 296-300. The ALJ denied the motion by *Memorandum Opinion and Order*,FCC 90M-540, released March 19, 1990. All competing applicants have excepted to this ruling.

11. Where an applicant relies upon a potential loan from a lending institution, the Commission requires that the bank have a "present firm intention to make [the] loan future conditions permitting." *Merrimack Valley Broadcasting, Inc.*,82 FCC 2d 166, 167 (1980). After reviewing this and other relevant Commission authorities in *Scioto Broadcasting*,5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), the Board reiterated that, to establish reasonable assurance of a committed source of funds from a lending institution, an applicant must show:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*,590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*,70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*,a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful" "reasonable assurance" showing of a loan from a financial institution is that the "individual" qualifications" of the borrower have been primarily reviewed, *Christina Communications*,2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

12. Here, Roberts' vague testimony that he had conversations with banking officials does not suggest that he revealed to the banks his assets, credit history, or current business plans. Thus, the existing record raises doubt that any bank had a "present firm intention" to finance Roberts' proposal. The I.D. further reveals that "Mr. Roberts is presently involved in the filing of applications with the Commission for Rural Service Area (RSA) cellular telephone authorizations (Tr. 292) . . . is the sole general partner of . . . the applicant for the facilities (Tr. 292-93, 306) . . . and he is obligated to contribute 428 RSA applications to the partnership (Firelands Exh. 4, p.4)." I.D., at para. 29. As we recently discussed in considerable detail, applicants must be financially ready, willing, and able to build all of their comtemporaneously proposed facilities, including cellular systems. *Breeze Broadcasting Company, Ltd.*,FCC 90R-103, released October 31, 1990, paras. 8-12. Roberts' vague testimony concerning his reliance on verbal discussions with bankers, and his plan to file for a large number of cellular applications, together raise a substantial and material question of fact as to Roberts' basic financial qualifications requiring a remand. Should it develop, during the remanded proceeding, that other substantial and material factual questions emerge (*e.g.*, false financial certification, misrepresentation), the ALJ has the sound discretion to add the appropriate issues. *Mableton Broadcasting*,FCC 90R-99, released October 30, 1990, at para. 40.

13. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a *Supplemental Initial Decision*on the following issues:

> a. To determine whether in its application as originally filed, Firelands Broadcasting Corp. falsely certified that it had reasonable assurance that its proposed transmitter site will be available to it for its intended purpose and, if so, the effect thereof on its basic qualifications to be a licensee.
>
> b. To determine whether Firelands Broadcasting Corp. has reasonable assurance of transmitter site availability and, thus, is technically qualified to be a licensee.
>
> c. To determine whether Thomas W. Roberts is financially qualified to be a licensee.

14. IT IS FURTHER ORDERED, That the two motions to enlarge issues filed on June 13, 1990 by NCB Enterprises, Inc. against Great Lakes Broadcasting, Inc. and Huron Communications Company and NCB's Supplement to Oral Argument filed November 2, 1990, and the respective pleadings relating thereto, ARE REFERRED to the Presiding Officer; and,

15. IT IS FURTHER ORDERED, That the unopposed petition for leave to amend filed on July 3, 1990 by Fireland Broadcasting Corp. IS GRANTED and the amendment IS ACCEPTED, and the Motion for Correction fo Transcript filed November 5, 1990 Huron Communications Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] We note that Firelands' "technical consultant," Glenn L. Bell, represents in the Engineering Exhibit that the new tower will be both "331 meters AGL" as well as "87 meters AGL." Based upon the Vertical Sketch (Exhibit E3), we assume the "331 meter AGL" reference is in error, and the proposed new tower will be "87 meters AGL, 331 meters AMSL."

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Perhaps the most frustrating aspect of the review function -- for all concerned -- is the need to remand for further hearing. At the Board level, the initial application processing has been completed, discovery and trial held, the record closed, exceptions (and responsive pleadings) traded, oral argument given, and the case apparently ripe for our decision. When we find that, in the face of exceptions, a perceptible chasm exists in the record, we have three options: (1) to find (as we most often do) that even if particular exceptions do pinpoint substantial and material issues of fact, the matter is not decisional and that further hearings would be superfluous [1]; (2) to reopen the record for clarifying supplementation, where the record is merely blurred by vagueness [2]; or (3) to remand for further hearing (a last resort), where substantial and material questions of fact prevent the delivery of a confident decision. [3]

We have issued more than our share of remand orders lately. We do not assess blame (our skillful trial bar has become especially adept-- as witness the remand order at hand -- at getting behind financial and transmitter site certifications); still, the frustration mounts, no doubt with the Board as well as *within* the Board.

Though we partake in the desire to keep these licensing proceedings as compact as possible (commensurate with full hearing requirements), I have come to the reluctant conclusion that, when there is strong vexation as to whether a critical issue should be added at hearing, the process should err (if ever so slightly) toward adding the issue. While this might seem logically to elongate the process, the number of remands lately persuades me otherwise. Because, no matter the frustration at this intermediate level, it does no good if and any all concerned in the hearing chain present the full Commission with a record that has graduated to the very top, only to be sent down again.[4]

FOOTNOTES TO SEPARATE STATEMENT

[1] *See, e.g., Newton Television Limited*,5 FCC Rcd 2755, 2756 (1990) (Board had not addressed "non-decisional" exceptions); *Richardson Broadcasting Group*,5 FCC Rcd 5285, 5293 (Rev. Bd. 1990) ("non-decisional" exceptions unresolved; no remand ordered); *Sarasota-Charlotte Broadcasting Corp.*,5 FCC Rcd 3937, 3839 (Rev. Bd. 1990) (same); *Rebecca L. Boedker*,5 FCC Rcd 2855, 2860 (Rev. Bd. 1990) (same).

[2] *See, e.g., A.P. W alter, Jr.*, 5 FCC Rcd 5586 (Rev. Bd. 1990); *Colonial Communications, Inc.*, 5 FCC Rcd 51 (Rev. Bd. 1990); Coastal Broadcasting Partners, 4 FCC Rcd 7512 (Rev. Bd. 1989); *Charisma Broadcasting Corp.*, 5 FCC Rcd 561 (Rev. Bd. 1990); *Global Information Technologies, Inc.*, 5 FCC Rcd 535 (Rev. Bd. 1990).

[3] *See Coast TV*, FCC 90R-107, adopted November 2,1990; *Breeze Broadcasting Co., Ltd*,FCC 90R-103, released October 31, 1990; *Mableton Broadcasting Co., Inc.*, FCC 90R-99 released October 30, 1990,*Albert E. Gary*, FCC 90R-96, released October 23, 1990; *Welch Communications, Inc.*,5 FCC Rcd 4850 (Rev.Bd. 1990); *Safe Broadcasting Corp.*,5 FCC Rcd 4917 (Rev. Bd. 1990); *Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990); *Rayne Broadcasting Co., Inc.*,5 FCC Rcd 3350 (Rev. Bd. 1990); *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916 (Rev. Bd. 1990).

[4] *See, e.g., Elijah Broadcasting Corp.*, 5 FCC Rcd 5350 (1990) (remand on Section 307(b) issue); *WCVQ TV, Inc.*, 5 FCC Rcd 3824 (1990) (remand on integration question); cf. *Pepper Schultz*, 5 FCC Rcd 3273 (1990) (case decided after two remands). *See also Dorothy O. Schultz and Deborah Brigham*, 5 FCC Rcd 3227 (1990)(remand for credibility findings); *Warren Price Communications, Inc.*, 5 FCC Rcd 2906 (1990) (remand on transmitter site issue); *Opal Chadwell*, 4 FCC Rcd 1215 (1989) (remand on financial issue); *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988) (remand on Section 307(b) issue); *San Jo aquin Television Improvement Corp.*, 2 FCC Rcd 7004 (1987) (remand on candor issue). And, if a vital factual question remains after full Commission persual, the court will demand a fuller hearing. *See Astroline Communications Co., LP v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985); *California Public Broadcast Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 329

Revisions to Tariff F.C.C. No. 4

ORDER

Adopted: November 9, 1990; Released: November 9, 1990

By the Chief, Common Carrier Bureau:

1. On August 14, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 329 to, *inter alia*, introduce a network reconfiguration service they call FlexServ Service. FlexServ would allow BellSouth customers to monitor and reconfigure their interstate Voice Grade and Digital Data Access Services and DS0 channels on their interstate high capacity services without the involvement of BellSouth personnel. To use the service the customer's special access services must be routed through a select number of BellSouth central offices which will offer FlexServ; more locations may be added as demand warrants. BellSouth Transmittal 329, Description and Justification at 1-1. To access the system the customer uses a terminal located at its premises to communicate with BellSouth using switched or private line service *Id.* at 2-1.

2. On August 29, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 329. MCI complains that FlexServ violates the Modification of Final Judgment (MFJ)[1] restrictions on local exchange carriers (LECs) providing interexchange traffic on a for-hire basis.[2] MCI Petition at 1. Specifically, MCI argues that while a customer would dial a local telephone number to access FlexServ, those communications links would be transmitted to Atlanta, Georgia, or Birmingham, Alabama, where BellSouth has its computer facilities for FlexServ. *Id.* at 3. Thus, according to MCI, unless the customer is located in one of those cities' local access and transport areas (LATA), FlexServ would require BellSouth to transmit communications across LATA boundaries, in violation of the MFJ. *Id.* at 4. In addition, MCI argues that the diagnostic information provided under FlexServ constitutes the creation and transmission of information for FlexServ customers, a violation of the MFJ prohibition on LECs providing information services. *Id.*

3. In its reply, filed September 10, 1990, BellSouth responds that MCI's petition does not state a valid ground for rejecting the tariff. BellSouth states that the sole objection to the service is MCI's allegation that FlexServ violates the MFJ. BellSouth argues that this contention is without merit, and in any event, it is not grounds to reject the tariff. According to BellSouth, it is Commission policy that allegations of MFJ violations, are not sufficient to reject a tariff, and the courts, not the Commission, are the proper forum to enforce the MFJ. [3] BellSouth Reply at 2-3.

4. The Common Carrier Bureau has reviewed BellSouth Transmittal No. 329, MCI's petition, and BellSouth's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection.

5. Accordingly, IT IS ORDERED that the petition to reject filed by MCI Telecommunications Corporation against BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 329, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[2] *See* United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C.), Section II(D.1).

[3] "Compliance with MFJ criteria is not one of the standards that we shall require an access tariff to satisfy. Compliance or noncompliance is an issue to be resolved by the Court." American Telephone and Telegraph Co., 94 FCC 2d 545, 550 n.9 (1983). *See also* Ohio Bell Telephone Co., 1 FCC Rcd 942, 944 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 14, 1990

PROCEDURES REGARDING NOTIFICATION TO THE FEDERAL COMMUNICATIONS COMMISSION OF THE FILING OF STATE TARIFFS BY THE BELL OPERATING COMPANIES RELATING TO OPEN NETWORK ARCHITECTURE

The Chief, Common Carrier Bureau, by Public Notice DA 90-769, dated May 25, 1990, initiated a procedure for keeping track of the Open Network Architecture (ONA) filings made with the various state public utility commissions. This procedure was developed by the the members of the Information Industry Liaison Committee (IILC), who requested that the Federal Communications Commission (Commission) implement their procedure on a trial basis. The procedure was to be in effect for an initial trial period of six months from the release date of May 25, 1990, and interested parties were requested to submit comments concerning the procedure no later than October 1, 1990.

BellSouth and U S West, Inc., were the only parties submitting comments as requested. BellSouth states that it believes that the results to date demonstrate that the procedure has proven to be effective and that this result is a reflection of the cooperative efforts of all the parties involved. The trial procedure has not created burdens of any consequence for BellSouth and their experience leads them to believe that the procedure has been responsive to the needs of the Enhanced Service Providers who are the primary users of the procedure. Finally, BellSouth recommends that the procedure continue to be treated as a trial in order to retain the informal and cooperative character of the procedure.

U S West, Inc., states that it is satisfied with the trial procedure and believes that it provides for the public notification of the state tariffing activities of the Regional Bell Operating Companies in a coordinated, uniform manner, in a single location. U S West, Inc., also states that it uses other communication media as well to inform the enhanced service providers of tariff filing activities. Finally, U S West, Inc., states that it plans to continue using this process and encourages the Commission to continue the IILC proposed procedure on a voluntary basis.

The Tariff Division's review does not reveal any significant burdens on the staff of the Tariff Division so long as the procedure remains in its present form. Therefore, the procedure will be continued as a trial as specified in the May 25, 1990 Public Notice until further notice. The Tariff Division will continue to publish a supplement to its normal daily Tariff Transmittal Public Reference Log (Log) on Wednesday of each week that will include the information from all the forms submitted since the last supplemental log. If the Commission is closed on a Wednesday because of a holiday or any other reason, the information will appear on the Log for the next working day. We encourage interested parties to continue to monitor the procedure and submit to the Tariff Division any comments concerning the process and suggestions for improvements to the procedure. Written comments should be addressed to John Cimko, Chief, Tariff Division, Federal Communications Commission, 1919 M St., N.W., Room 518, Washington, D.C. 20554.

Any questions concerning this procedure should be referred to Judy Nitsche or Tom Elcan, Tariff Review Branch, 1919 M St., N.W., Room 518, telephone 202-632-5550.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-442

In re Applications of

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT	File No. BPED-860624MC
SUN HEALTH CORPORATION	File No. BPED-870626MB
ARIZONA BOARD OF REGENTS FOR ARIZONA STATE UNIVERSITY	File No. BPED-870626MC

For Construction Permit for
New Noncommercial Educational
Broadcast Station, Channel 208A,
Phoenix, Arizona

ORDER

Adopted: November 13, 1990; Released: November 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Applicant Sun Health Corporation has not filed exceptions with the Board from the *Initial Decision*, 5 FCC Rcd 4081 (1990), of Administrative Law Judge Richard L. Sippel. Pursuant to 47 CFR § 1.276(f), its application will be dismissed, with prejudice, for failure to prosecute.

2. ACCORDINGLY, IT IS ORDERED, That the application of Sun Health Corporation (File No. BPH-870626MB), IS DISMISSED with prejudice; and,

3. IT IS FURTHER ORDERED, That the Motion to Dismiss, filed August 24, 1990, by Maricopa County Community College District IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-387

In re Applications of

ROXANNE GIVENS	File No. BPH-871202MC
MINNESOTA PUBLIC RADIO	File No. BPED-871203MC
NANCY-JEAN PETERSON	File No. BPH-871203MF
SOUTHWEST SUBURBAN BROADCASTING, INC.	File No. BPH-871203MH
CRIMIEL COMMUNICATIONS ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-871203MN
JH BROADCAST LIMITED PARTNERSHIP	File No. BPH-871203NF
ANNE M. COUNIHAN	File No. BPH-871203NQ
COVE COMMUNICATIONS, INC.	File No. BPH-871203NT

For Construction Permit for New
FM Station, Channel 289A,
Eden Prairie, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1990; Released: November 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it a Petition for Extraordinary Relief and Expedited Action, filed October 30, 1990 by the above-captioned applicants, accompanied by related pleadings, pertaining to *Memorandum Opinion and Order*, FCC 90R-93, released October 16, 1990, in which the Board dismissed a petition for reconsideration filed by N. Walter Goins of an earlier ruling (5 FCC Rcd 5371 (Rev. Bd. 1990)) denying Goins' appeal of his dismissal from this proceeding. Summary dismissal of Goins' reconsideration petition was mandated by three discrete provisions of the Commission's Rules: 47 CFR § 1.102(b)(2) ("Petitions for reconsideration of interlocutory actions will not be entertained"); 47 CFR § 1.106(a)(1) ("Petitions for reconsideration of [non-final] interlocutory actions will not be entertained"); and 47 CFR § 1.291(c)(3) ("Petitions requesting reconsideration of an interlocutory ruling made by . . . the Review Board . . . will not be entertained").

2. Our *Order* also added that, "[m]oreover, pursuant to 47 CFR § 1.115(e)(1), further review of the Board's action may only be sought in the context of an application for review of a subsequent 'final decision' in this proceeding." It is with respect to this language that petitioners seek relief. They request that we vacate our prior *Order*, reaffirm Goins' dismissal from this proceeding, and clarify that Goins may immediately file an application for review without waiting for a final decision. [1]

3. Although the parties' instant petition, in essence, seeks a reconsideration of our earlier *Order*, and, thus, does not technically lie for the reasons already set forth in paragraph 1, it has highlighted a problem which we will now correct on our own motion, thus enabling Goins to file an immediate application for review of the Board's affirmance of his dismissal. We note that 47 CFR §1.115 recently has been amended to conform the rule with existing general Commission practice of allowing immediate review of appeals as of right. *See Review of Motions to Disqualify Presiding Officer*, 5 FCC Rcd 5366 (1990), where the language of 47 CFR § 1.115(e) was revised as follows:

> Applications for review of interlocutory rulings made by the Review Board (*see* §§ 0.365(b), 1.301) shall be filed only as part of the application for review of the Board's final decision, *except that applications for review of rulings by the Board pursuant to § 1. 301 (a) [appeals as of right] may be filed separately after such ruling by the Board.*

See generally WWOR-TV, Inc., FCC 90-345, released October 18, 1990. Under the circumstances, we will delete from our earlier *Order* the language to which petitioners object (set forth in para. 2, *supra*). As it appears that Goins may file a timely appeal from our ruling affirming his dismissal from this proceeding, his appeal rights, pursuant to 47 CFR § 1.115, will now run from the release date of this *Order*. *See* 47 CFR §1.113(c) (computation of filing date runs from the date of ruling as modified). [2]

4. ACCORDINGLY, IT IS ORDERED, That the last six lines of paragraph 2 in *Memorandum Opinion and Order*, FCC 90R-93, released October 16, 1990, (quoted herein at para. 2, *supra*) ARE DELETED, *sua sponte*, in accordance with the foregoing; that the Petition for Extraordinary Relief and Expedited Action, filed October 30, 1990 by all parties to this proceeding IS DISMISSED; and that a Request for Leave to File, filed October 30, 1990 by all the captioned parties, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] An impasse has been caused by an agreement now pending before the Presiding Judge to settle this multi-party proceeding, which may preclude an *Initial Decision* from ever being issued. *See* Goins' Statement for the Record, filed October 23, 1990, asserting that he cannot seek review of the dismissal rulings until receipt of an *Initial Decision*.

[2] Pre-publication copies of this document will be mailed to the remaining parties and to N. Walter Goins at the address indicated in his petition: 931 Lakeshore Drive, Big Lake, Minnesota 55309.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PEOPLES TELEPHONE CO, INC. File No. I-T-C-90-162

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1990; Released: November 20, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 14, 1990 by Peoples Telephone Co., Inc. (Peoples), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice services between the U.S. and various overseas points. The application was placed on public notice on August 22, 1990. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Peoples.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-162 IS GRANTED, and Peoples is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-80

In re Applications of

LORRAINE WALKER ARMS	File No. BPCT-881202KK
PZ ENTERTAINMENT PARTNERSHIP, L.P.	File No. BPCT-881205KG
MEDIA PROFILES, INC.	File No. BPCT-881205KI
TIERRA ALTA BROADCASTING, INC.	File No. BPCT-881205KJ
ECHONET CORPORATION	File No. BPCT-881205KM

For Construction Permit for a
New Television Station on
Channel 15, Las Vegas, Nevada

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1990; Released: November 21, 1990

By the Commission:

1. We have before us an application for review of a Memorandum Opinion and Order of the Review Board, 5 FCC Rcd 3426, released June 9, 1990, filed by PZ Entertainment Partnership, L.P. (PZ), and an opposition thereto filed by Tierra Alta Broadcasting, Inc. We will deny the appeal.[1]

2. PZ contends that the Board erred by affirming an order of the presiding ALJ dismissing PZ's application for failure to prosecute. The Board held that the dismissal was warranted because Meshulam Riklis, the sole owner of PZ's corporate general partner and its 99 percent equity owner, had refused to appear at the hearing for cross examination, in defiance of orders from the ALJ. PZ objects that the Board failed to weigh the factors that the Court of Appeals mentioned in *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), as relevant in deciding whether there is just cause for dismissal for failure to prosecute:

> The applicant's proffered justification for the failure to comply with the Presiding Officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter further misconduct.

Id. at 1554. PZ maintains that dismissal is unwarranted in this instance because Riklis' refusal to appear was not prejudicial to other parties, as there was assertedly no need for him to testify, and because it had not engaged in a pattern of derelictions or constructively abandoned pursuit of its application.

3. There is no inconsistency between the ruling under appeal and the holding of *Comuni-Centre*, even assuming, *arguendo*, that there was no need for cross examination of Riklis and hence that his non-appearance was not prejudicial to the rights of any party. Neither *Comuni-Centre* nor any other precedent that PZ cites holds or implies that an ALJ may not dismiss an application from a comparative proceeding for a principal's refusal to comply with an order to testify unless the refusal is part of a pattern of derelictions or prejudicial to the rights of other parties. Rather, *Comuni-Centre* merely indicates that prejudice is one among several factors to consider in deciding whether dismissal is in order. In this case, there was ample cause for imposing that sanction in light of other relevant concerns.

4. What we confront here is not merely dilatory noncompliance with procedural deadlines, but willful defiance of the ALJ's lawful order that Riklis should appear and testify based on his ownership of the applicant's corporate general partner. The only justification that PZ offered for its principal's refusal to comply with the order was its own view that there was no need for him to testify. It does not appear, and PZ does not allege, that compliance with the order would have impaired any interest except the personal convenience of Mr. Riklis. Moreover, PZ sought no relief from the order prior to its effective date; it did not ask the ALJ to stay his ruling or to authorize an interlocutory appeal from it. No hearing system can function effectively if parties may disregard a presiding officer's lawful orders with impunity.[2] It would defeat the purpose of endowing administrative law judges with authority to supervise hearings for the Commission to entertain arguments, going to the merits of routine interlocutory orders that are unappealable as a matter of right, when considering appeals from dismissal for refusal to comply with such orders. If we were to follow such a practice our ALJs would be reduced to impotence and our hearings to chaos. We therefore conclude that "the need to punish abuse of the system and to deter further misconduct," as specified in *Comuni-Centre*, warrants dismissal of PZ's application. *See* also 47 C.F.R. § 1.243(f), which declares that presiding officers have discretion to "exclude from the hearing any person engaging in contemptuous conduct . . . ."

5. ACCORDINGLY, IT IS ORDERED that the application for review filed by PZ Entertainment Partnership, L.P. on July 9, 1990 IS DENIED.

6. IT IS FURTHER ORDERED that the motion to strike that Lorraine Walker Arms filed with the Commission on August 28, 1990 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We also have before us a "Motion to Strike 'Supplemental Proposed Findings of Tierra Alta Broadcasting, Inc.'" filed by Lorraine Walker Arms on August 28, 1990. We will dismiss that motion as moot, in light of information in a similar motion that Lorraine Walker Arms filed more recently with the ALJ that Tierra Alta has withdrawn the supplemental findings from the Commission and resubmitted them to the ALJ. This action is without prejudice to disposition of the strike motion addressed to the ALJ.

[2] Despite PZ's argument that the ALJ's order was unwarranted, it was unquestionably issued pursuant to lawful authority, and its issuance was not so obviously capricious as to constitute an abuse of discretion. An applicant does not have the right to disobey a jurisdictionally-valid order from which he has not sought relief merely because he believes that it is mistaken.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-395

In re Applications of

MEREDITH CORPORATION — File No. BPCT-850827KE

WEST FLORIDA TELEVISION, LTD. — File No. BPCT-850828KQ

For a Construction Permit
Inverness, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1990; Released: November 21, 1990

By the Commission:

1. Pending before us is an application for review of the Decision of the Review Board in this case, 4 FCC Rcd 2666 (1989), filed by Wabash Valley Broadcasting Corporation. The Review Board, in that decision, affirmed the ultimate conclusion of the administrative law judge that it would serve the public interest to grant the application of Meredith Corporation for permission to construct a 100% television satellite station on UHF Channel 64 at Inverness, as an adjunct of Meredith's licensed television station serving Orlando, Florida. Meredith and the Mass Media Bureau have filed oppositions to the application for review.[1] We will grant the application for review and reverse the Board's decision.

BACKGROUND

2. The FCC allotted UHF Channel 64 to Inverness in 1985. Four parties applied for permission to build a station to broadcast on the newly-allotted channel. Three of them proposed to build and operate a conventional UHF station. The other applicant, Meredith Corporation, which is the licensee of WOFL-TV, UHF Channel 35, Orlando, Florida, proposed to establish a 100% satellite of its Orlando television station. In other words, Meredith proposed to establish a station in Inverness, without production facilities of its own, that would duplicate the broadcasts of WOFL-TV at all times. The proposed satellite station would, in effect, nearly double the Grade B coverage of WOFL-TV and for the first time extend its signal over Ocala, a city situated 27 miles from Inverness that is the community of license of a UHF station licensed to the intervenor, Wabash Valley, which opposes Meredith's application.

3. But for the fact that Meredith proposed to establish a satellite station, its application would have been incompatible with the Commission's duopoly rule, because Meredith's predicted Inverness Grade B signal would overlap the Grade B contour of its Orlando station. *See* 47 C.F.R. § 73.3555(a)(3). Note 5 of that rule provides that proposals for television satellite operation involving duopoly overlap are to be considered case by case to determine whether common ownership, operation, or control of the stations in question would be in the public interest.

4. The Commission set the four mutually exclusive applications for consolidated comparative hearing. Hearing Designation Order, 51 Fed. Reg. 1433, January 13, 1986. In accordance with Note 5 to Section 73.3555, the Hearing Designation Order specified a so-called "satellite necessity" issue against Meredith:

> To determine, with respect to Meredith Corporation whether circumstances exist which would make operation as a "satellite" or "primarily a satellite" necessary for Inverness, Florida.

Meredith bears the burden of proof under that issue.

5. In June 1986 the ALJ dismissed two of the full-service applications, and the remaining full-service applicant, West Florida Television Limited, soon afterward joined with Meredith in requesting approval of a settlement agreement under which West Florida would withdraw its application in consideration of, inter alia, payment of $1,000,000 from Meredith. Meredith simultaneously filed a motion for summary judgment on the satellite necessity issue. Wabash Valley's predecessor in interest, Big Sun Television, Inc., intervened and filed an (opposition to the motion for summary decision supported by a study by a broadcast economist, Charles Kadlec, who maintained: (1) that there is no need to permit the establishment of a satellite station in Inverness because potential market revenues would profitably sustain a full-service television station there; and (2) that Meredith's deployment of a satellite in Inverness would adversely affect Big Sun's Ocala UHF station, impairing its ability to provide public service programming. In response, Meredith submitted a critique of Kadlec's study by another consultant, Susan D. Harrison, and a further study by Harrison concluding that the market would not support a full service Inverness television station.

6. The ALJ granted Meredith's motion for summary decision, approved the settlement agreement, and dismissed the competing application of West Florida. Wabash Valley, which had in the meanwhile bought Big Sun's Ocala station, appealed both orders to the Review Board. The Board vacated the summary decision and the approval of the settlement agreement and remanded for a trial on the satellite necessity issue. 2 FCC Rcd 3927 (1987).

7. The Kadlec study, Harrison's critique of it, and Harrison's own study were received in evidence at the remand hearing, and counsel for Meredith, Wabash Valley, West Florida, and the Mass Media Bureau extensively cross-examined Harrison and Kadlec. 4 FCC Rcd 2670 ¶ 18. Finding Harrison's negative assessment of the economic feasibility of establishing a full-service station on the Inverness UHF channel more convincing than Kadlec's more optimistic one, the ALJ held in the Initial Decision that Meredith had satisfied its burden of proof under the satellite issue. 3 FCC Rcd 5436 (1988). He therefore granted Meredith's application, approved the settlement agreement, and dismissed West Florida's application.

8. Wabash Valley appealed the Initial Decision to the Review Board, contending that the ALJ had improperly excluded evidence as to the prospective impact of Meredith's proposed satellite station on the programming of Wabash Valley's station and had wrongly denied a motion for a rebuttal session. Further, Wabash Valley contended that the ALJ had erred by failing to recognize the significance of the pendency of West Florida's application. The fact that West Florida remains before the Commission as a live applicant for a full-service Inverness station, notwithstanding its willingness to withdraw in exchange for payment, conclusively negated Meredith's attempt to prove that there was no realistic prospect for sustained operation of a full-service station on the channel at issue, according to Wabash Valley.

9. The Board saw no merit in Wabash Valley's contention that the pendency of West Florida's full-service application was proof of economic potential for sustained operation of a full-service station on the Inverness Channel 64 allotment. The "technical" pendency of that application was merely due to the deferral of approval of the dismissal agreement pending final grant of Meredith's application, the Board said, and no one questioned the sincerity of West Florida's contingent intention to withdraw. 4 FCC Rcd at 2679 ¶ 50.

10. After reviewing the record, the Board concurred with the ALJ's conclusion that the preponderance of the evidence proved that it would not be feasible to establish a conventional UHF station at Inverness. *Id.* at 2675-2678 ¶¶ 40-49. It therefore affirmed the grant of Meredith's application in light of further findings that Inverness is a small community of only 4,000 inhabitants in rural surroundings situated at least 25 miles from any large community and is not the community of license for any existing television station. *Id.* at 2678 ¶ 48. However, in view of the assertedly high rate of population growth of South Florida's western coast, the Board made the grant subject to the condition that Meredith submit a "specific showing" with regular renewal applications that continued operation of the station as a 100% satellite would serve the public interest. *Id.* at 2679 ¶ 51.

11. Wabash Valley submits in its application for review that the Board's Decision is wrong in four respects. First, it contends that the Board erred in upholding the ALJ's refusal to allow it to present rebuttal evidence. Second, Wabash Valley contends that the Board erred in upholding the ALJ's exclusion of evidence that the proposed satellite station would impair the ability of competing conventional stations to provide "public interest programming." Third, Wabash Valley contends that the Board was wrong in holding that the pendency of West Florida's application is irrelevant, citing *TV-8, Inc.*, 91 FCC 2d 1012 (Rev. Bd. 1982), rev. denied, FCC 83-238 (released August 29, 1983), in which the Review Board held that a "satellite necessity" showing, though otherwise arguably sufficient, was inadequate in light of the pendency of a competing conventional application. Wabash Valley maintains that the Commission should not discount the significance of the West Florida application just because that applicant has contingently agreed to withdraw in exchange for compensation. It would be wrong, Wabash Valley asserts, to assume that any full-service applicant who accepts a settlement offer from a competing satellite applicant would be unwilling to carry out its original proposal if the settlement were to be made moot by a rejection of the satellite application. On the contrary, Wabash Valley argues that the size of the payment specified in its agreement with West Florida proves that a strong incentive was required to induce that applicant to curtail its plan to establish a new conventional station. Fourth, Wabash Valley contends that the Board's assessment of the record is incorrect. Wabash Valley therefore urges the Commission to deny Meredith's application or else remand the case with instructions for the development of an adequate record.

DISCUSSION

12. We agree with Wabash Valley that the pendency of West Florida's application is relevant and that the Board erred in holding otherwise. It is true that there is no reason to doubt the sincerity of West Florida's commitment to withdraw pursuant to the terms of its settlement agreement with Meredith, but that is largely beside the point. The commitment to withdraw is not absolute; rather, it is contingent upon Meredith's paying $1,000,000 to West Florida, which Meredith has agreed to do only in the event that the Commission grants its application. To reason, as the Board did, that West Florida's application is irrelevant to the satellite issue in light of that contingent commitment is to focus on the wrong question.[2]

13. The right question is what West Florida would do in the event that Meredith's application is not granted. The fact that West Florida agreed to withdraw in the event that Meredith prevails and pays it a large sum of money supports no inference that West Florida would abandon its application if we were to grant it and deny Meredith's application, thus rendering the conditional "buy-out" agreement inoperative. (As Wabash Valley remarks, any applicant for a commercial station would presumably agree to withdraw for a cash payment if the price were right.) On the contrary, it appears that West Florida still intends to carry out its proposal should we grant its application. By maintaining its application on file subject to its conditional request to withdraw, West Florida has in effect represented that it intends to carry out its proposal *unless* the settlement is consummated, *i.e.*, unless the Commission approves the settlement agreement and gives it effect by granting Meredith's application. Cf. *Land O' Lakes Broadcasting Corporation*, 4 FCC Rcd 344, 348 ¶ 31 (1989) (by filing and prosecuting an application for modification of permit, the permittee effectively represented that he intended to build the originally-specified facility should the Commission deny the proposed modification). If it appeared that West Florida had abandoned any intention of establishing the facility described in its application, under any circumstances, yet had left the application on file thereafter without disclosing more than a contingent intention to withdraw, a serious question would be presented as to its candor. No one contends, however, that there is cause to question the sincerity of West Florida's underlying commitment to carry out its proposal, and it is *that* commitment, not the alternative commitment to withdraw in the event of consummation of the settlement agreement, that matters.

14. We therefore conclude that West Florida intends to build and operate as it proposes in its application should the Commission deny Meredith's application and thus prevent occurrence of the prerequisite conditions for execution of the settlement agreement. Hence, the pendency of West Florida's application is relevant to the satellite necessity issue. The fact that an applicant is seeking per-

mission to build and operate a full-service station on Channel 64 at Inverness should we deny Meredith's application is evidence that the establishment of such a full-service station is thought to be feasible by someone who is ostensibly willing to make an investment on that assumption. More importantly, the pendency of the West Florida application signifies that the potential for successful establishment of a full-service UHF station at Inverness can be put to the test of actual experience. We have a choice between granting Meredith's duopoly satellite application on the strength of a prediction, distilled from conflicting and speculative testimony, that a full-service station operating on the channel at issue would prove to be unprofitable, on the one hand, or of granting permission for West Florida to build a full-service station, thus affording an opportunity for an entrepreneur who is apparently willing to undertake such an enterprise to carry out his plan. The latter option seems clearly preferable. We decline to grant Meredith's satellite application in reliance on speculation that the channel cannot be profitably used for conventional operation when we have before us a grantable application from another party for permission to use it in just that way. [3]

15. Our holding is consistent with *TV-8*, supra, which the Review Board failed to distinguish in its opinion below. There was a choice in *TV-8*, as here, between granting a duopoly satellite application or granting a full-service application for the same channel. In a decision that the Commission upheld on review, the Board granted the full-service application after concluding that the evidence was insufficient to sustain a finding of "necessity" because a qualified competing applicant was on hand which proposed to establish a full-service station. 91 FCC 2d at 1017.

16. Meredith argues that *TV-8* is distinguishable from this case on two grounds: (1) the decision in *TV-8* allegedly turned on assurance by the full-service applicant that he would provide "immediate" full service, whereas West Florida "no longer offers to construct and operate a full service station and urges dismissal . . . of its application"; (2) in *TV-8* the full-service proposal was feasible only because the full-service applicant could cross-subsidize its proposed television station with revenues from its established local AM station, whereas West Florida has no such resources to sustain its proposed full-service station at Inverness. These contentions are unpersuasive.

17. There is no indication in the *TV-8* decision that there was any assurance that the full-service applicant would promptly commence operation, other than the usual assurance afforded by the pendency of its application. The Board said that the one applicant proposed "immediate" full service merely in a relative sense, meaning just that it proposed to provide full service from the inception of operation, in contrast with its adversary, which proposed to provide satellite service until such time as it might seem expedient to introduce a full measure of local programming. 91 FCC 2d at 1017. There is no reason on the present record to conclude that West Florida will not promptly carry out its proposal after receiving a permit.

18. Meredith's second distinction is equally deficient. There was no finding in *T-8* that the applicant that proposed to establish a full-service television station planned to subsidize it with "surplus revenues" from its AM station; the Board merely noted, rather, that small economies would be realized from co-location of the commonly-owned AM and television stations. *Id.* at 1015. Although it observed that the anticipated savings would "improve the potential viability of the proposed UHF station," the Board did not make any finding based on cost and revenue projections that the full-service proposal would ultimately prove economically viable. On the contrary, the Board assumed for purposes of its decision in *TV-8* that the preponderance of the economic evidence, if considered in isolation, would support a finding that there was necessity for permitting the establishment of a satellite station, *i.e.*, that establishment and sustained operation of a full-service station in the market in question was economically infeasible. It rested its holding that there was insufficient justification for authorizing a satellite operation simply on the countervailing circumstance that a qualified party was applying for a permit for construction of a full-service station to make use of the channel at issue. *Id.*[4]

19. In sum, we hold that there is no compelling justification for granting permission for Meredith to use Inverness Channel 64 for a satellite station, inasmuch as West Florida, a qualified applicant, seeks permission to build and operate a full-service station using that channel in compliance with the rules. We do not find it necessary to decide whether the Board correctly weighed the conflicting expert testimony in the decision under appeal or whether the ALJ correctly denied Wabash Valley's motion for a rebuttal session. Those questions are immaterial in light of West Florida's commitment to undertake the establishment of a full-service station, in compliance with the Commission's rules, should we grant its application rather than Meredith's. In the face of conflicting testimony and the presence of West Florida's application for a conventional station, Meredith has not met its burden of demonstrating by a preponderance of the evidence that there is a necessity for assigning the channel for use by a duopoly satellite station.

20. ACCORDINGLY, IT IS ORDERED: that the application for review filed by Wabash Valley Broadcasting Corporation on May 8, 1989 IS GRANTED; that the Review Board Decision in this case IS VACATED; that the application of West Florida Television, Ltd. IS GRANTED; and that the competing application of Meredith Corporation IS DENIED.

21. IT IS FURTHER ORDERED that the motion for expedited action filed by Meredith Corporation on April 12, 1990 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Meredith also filed a motion for expedited action on its application for review on April 12, 1990, in response to which Wabash Valley filed comments on April 23. Meredith filed a reply to the comments on May 2 and a supplement to its motion on June 14. The Commission has resolved this case as expeditiously as possible consistent with the orderly disposition of its business.

[2] In order to satisfy inquiry pursuant to § 73.3555, Note 5, satellite applicants have been required to show, at minimum, that the channel at issue could not feasibly be used for the establishment of an independent station. *See, e.g., Suburban Broadcasting Corp.*, 83 FCC 2d 359 (1980); *Connecticut Radio Foundation, Inc.*, 7 RR 2d 290 (1966).

The Commission's recent call for further comments on proposals for revision or refinement of its policies regarding the authorization of duopoly satellite stations, *Further Notice of Proposed Rule Making in Docket 87 - 8*, FCC 90-279 (adopted August 1, 1990), has no material bearing on our decision here. As the *Further Notice* states, pending the resolution of the Rule Making the Commission will dispose of applications on hand pursuant to existing precedent. *Id.* at ¶ 18 (slip opinion at p.8). In any event, there is no inconsistency between our analysis here and the discussion in the *Further Notice*.

[3] Commenting on the application for review, the Commission's Mass Media Bureau concedes that the Board erred in deciding the satellite issue in Meredith's favor but maintains that the error is harmless because the Board conditioned its grant of Meredith's application on a requirement that Meredith submit further showings of "satellite necessity" in conjunction with future applications for license renewal. Because that condition, like the proposed settlement agreement, has no material bearing on the satellite issue, we do not agree that the attachment of the condition renders the Board's error harmless.

[4] *Cf. Coral Television Corp.*, 80 FCC 2d 323 (1980), in which the Commission declined to grant waivers and consider an application on the merits because another application was pending for the same channel which was fully in compliance with the rules; although it had previously indicated that it would have entertained the former had it been unopposed, the Commission held that it would disserve the public to designate an "infirm" application for comparative hearing with one that was fault-free.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-12

In the Matter of

Amendment of Section 73.202(b),	RM-7087
Table of Allotments,	
FM Broadcast Stations.	
(Thousand Palms, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 587 (1990), issued in response to a request filed on behalf of Jeffrey Rochlis (petitioner), proposing the allotment of Channel 234A to Thousand Palms, California, as that community's first local FM broadcast service.[1] Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 234A to Thousand Palms, California, since it could provide a first local FM service to that community. As indicated in the *Notice*, Channel 234A can be allotted to Thousand Palms consistent with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is sited at least 3.0 kilometers (1.9 miles) east[2] of the community to avoid short-spacing on the co-channel to Station KTWV-FM, Channel 234B, Los Angeles, California. [3] Additionally, since Thousand Palms is located within 320 kilometers (199 miles) of the Mexican border, the Commission obtained Mexico's concurrence in the proposal.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Thousand Palms, California	234A

4. The window period for filing applications for Channel 234A at Thousand Palms, California, will open on **January 11, 1991,** and close on **February 10, 1991.** [4]

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Upon representation of counsel, the *Notice* identified petitioner's proposal as constituting a first local broadcast service request at Thousand Palms. We note, however, that AM Stations KPSL and KNWZ are licensed to that community.

[2] Coordinates used for Channel 234A at Thousand Palms are 33-49-20 and 116-21-57.

[3] Coordinates at the licensed site of Station KTWV-FM are 34-13-29 and 118-03-47.

[4] Because the petition for rule making in this proceeding was filed prior to October 2, 1989, applicants for Channel 234A at Thousand Palms, California, may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-580

In the Matter of

Amendment of Section 73.202(b), RM-7503
Table of Allotments,
FM Broadcast Stations.
(Dorrington, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Matthew J. Cullen (petitioner) seeking the allotment of FM Channel 291A to Dorrington, California, as its first local broadcast service. Petitioner stated a willingness to apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Dorrington is not listed in the U.S. Census.[1] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Dorrington has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Oak Grove, Florida*, 5 FCC Rcd 3774 (1990); *Hannibal, Ohio*, 5 FCC Rcd 3315 (1990); *Statenville, Georgia*, 5 FCC Rcd 2685 (1990); *Columbia, California*, 5 FCC Rcd 2003 (1990); and *Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989).

3. A staff engineering review of the proposal reveals that Channel 291A can be allotted to Dorrington consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

4. We believe the public interest would be served by proposing the allotment of Channel 291A to Dorrington, California, if it is ultimately found to be a community for allotment purposes, since an interest has been expressed in providing that locality with a first local broadcast service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Dorrington, as follows:

	Channel No.	
City	Present	Proposed
Dorrington, California	--	291A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 17, 1991,** and reply comments on or before **February 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Matthew J. Cullen
P.O. Box 2177
Arnold, CA 95223

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420( ) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Dorrington is listed in the 1988 Rand McNally Commercial Atlas, no population figure is listed, nor is any community data given. Mere geographical location alone is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983).

[2] Coordinates used for Channel 291A at Dorrington are 38-18-05 and 120-16-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-404

In the Matter of

Amendment of Section 73.202(b),	RM-6895
Table of Allotments,	RM-7133
FM Broadcast Stations.	
(Greenwood, South Carolina, and	
Gibson, Georgia[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of United Community Enterprises, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6943 (1989), proposing the substitution of Channel 278C3 for Channel 278A at Greenwood, South Carolina, and the modification of its license for Station WMTY-FM to specify operation on the higher powered channel. Prior to the initial comment deadline, Heart of Dixie Broadcasting, Inc. ("Heart of Dixie"), filed a petition requesting the allotment of Channel 278A to Gibson, Georgia, as its first local FM service.[2] Greenwood and Gibson are located approximately 116 kilometers apart while the Commission's Rules stipulate a minimum distance separation of 142 kilometers for co-channel Class A and C3 allotments.[3] Therefore, the proposals are mutually exclusive. Petitioner filed comments reiterating its intention to apply for Channel 278C3, if allotted to Greenwood. Petitioner, Heart of Dixie and Thomas Cole ("Cole") filed reply comments.

2. Heart of Dixie states that Gibson, the seat of of Glascock County, is an incorporated community. It contends that adoption of its proposal better serves the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), because it would provide a first local transmission service to Gibson, as opposed to the upgraded service that would result from adoption of petitioner's proposal. In addition, Heart of Dixie points out that another Class A FM station and two daytime-only AM stations are licensed to Greenwood. Therefore, it urges the allotment of Channel 278A to Gibson. Heart of Dixie states that it will file an application for Channel 278A, if allotted to Gibson. Cole also supports the allotment of a first local service to Gibson and states his intention to apply for the channel, if allotted.

3. Petitioner states that the two proposals need not be mutually exclusive. While recognizing that Channel 278A cannot be allotted to Gibson if Channel 278C3 is allotted to Greenwood, it states that Channel 228A can be allotted to Gibson, with a site restriction 10 kilometers (6.2 miles) southeast if the license of Station WSNT-FM at Sandersville, Georgia, is modified to specify operation on Channel 260A in lieu of its present Channel 228A. Petitioner therefore requests that the Commission issue an *Order to Show Cause* to Station WSNT-FM as to why its license should not be modified to specify the alternate Class A frequency. Petitioner states that it will reimburse Station WSNT-FM for one-half of the expenses incurred in the change of channel, with the remaining one-half to be paid by the eventual Gibson permittee.

4. We have carefully reviewed all of the pleadings before us in this proceeding and find that the public interest would be served by the provision of a first local service at Gibson as well as the expansion of service by Station WMTY-FM at Greenwood. Further, we have determined that an alternate channel is available for Gibson which removes the need to comparatively consider the two proposals. A staff engineering study shows that Channel 234A can be allotted to Gibson.[4] We believe that the allotment of Channel 234A is preferable to petitioner's proposal to allot Channel 228A to Gibson because it does not require a change in any other station's existing operation.

5. Channel 278C3 can be allotted to Greenwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) southeast to avoid a short-spacing to Station WRIX-FM, Channel 276A, Honea Path, South Carolina, and to Channel 277A at Greer, South Carolina, which is unoccupied but applied for. Channel 234A can be allotted to Gibson with a site restriction of 8.4 kilometers (5.2 miles) northwest to avoid a short-spacing to Station WBYZ, Channel 233C, Baxley, Georgia, Station WAAW, Channel 234A, Williston, South Carolina, and the proposed allotment of Channel 235C3 to Millen, Georgia, in MM Docket 89-586, 4 FCC Rcd 8747 (1989).[5] As proposed, we will also modify petitioner's license for Station WMTY-FM to specify operation on the higher powered channel.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gibson, Georgia	234A
Greenwood, South Carolina	244A, 278C3

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of United Community Enterprises, Inc. for Station WMTY-FM, Greenwood, South Carolina, IS MODIFIED to specify operation on Channel 278C3, in lieu of Channel 278A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order*, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station WAAW, as follows: Bay Communications, Inc., Box 291 Yarmouth Road, Freeport, Maine 04032.

9. The window period for filing applications for Channel 234A at Gibson, Georgia, will open on **January 11, 1991,** and close on **February 10, 1991.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Gibson, Georgia, has been added to the caption.

[2] Public Notice of the filing of this proposal was given on November 3, 1989, Report No. 1800.

[3] Petitioner's request to allot Channel 278C3 to Greenwood was filed prior to October 2, 1989. Therefore, the mileage separation requirements for the Greenwood allotment are those which were in effect prior to the revision of the Commission's Rules in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which, *inter alia*, increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance spacing requirements accordingly. Heart of Dixie's request was filed after October 2, 1989, and therefore the mileage separation requirements for Gibson are those which were adopted in MM Docket 88-375.

[4] We recognize that the allotment of Channel 234A to Gibson, at the coordinates specified herein, conflicts with the pending application of Bay Communications, Inc., for Station WAAW, Channel 234A, Williston, South Carolina (BMPH-891002IK) to change transmitter site and power. However, because an applied for but unauthorized transmitter site generally reflects a preference for a particular location, it is typically not favored over the provision of a new service. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984, and cases cited therein. *See also Springdale, Arkansas*, 4 FCC Rcd 674, 677 n.14 (1989). Consistent with this policy, Station WAAW will be required to amend its application to specify a non-conflicting transmitter site. We will direct the Secretary of the Commission to serve the licensee of Station WAAW with a copy of this *Report and Order*.

[5] The coordinates for Channel 278C3 at Greenwood, South Carolina, are North Latitude 34-09-28 and West Longitude 82-07-42. The coordinates for Channel 234A at Gibson, Georgia, are 33-15-41 and 82-40-47. Since the Greenwood substitution is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee of Station WMTY-FM may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-581

In the Matter of

Amendment of Section 73.202(b), RM-7521
Table of Allotments,
FM Broadcast Stations.
(Volga, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by CD Broadcasting Corporation of Brookings ("petitioner") requesting the substitution of Channel 272C3 for Channel 272A at Volga, South Dakota, and the modification of petitioner's license for Station KKQQ-FM to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 272C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 272C3 for Channel 272A at Volga, South Dakota, since it could provide the community with a wide coverage area FM service. Channel 272C3 can be allotted to Volga in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) south of the community to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KKQQ-FM to specify operation on Channel 272C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 272C3 at Volga or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Volga, South Dakota	272A	272C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 17, 1991,** and reply comments on or before **February 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

CD Broadcasting Corporation of Brookings
308 Edina Executive Plaza
5200 Willson Road
Edina, Minnesota 55424
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 272C3 are North Latitude 44-15-21 and West Longitude 96-57-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-228

In the Matter of

Amendment of Section 73.202(b),	RM-7293
Table of Allotments,	
FM Broadcast Stations.	
(Healdsburg, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 2812 (1990), issued in response to a petition filed on behalf of E & E Communications (petitioner), proposing the allotment of Channel 240A to Healdsburg, California, as that community's second local FM broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 240A to Healdsburg, since it could provide an additional local FM broadcast service to the community.

3. As indicated in the *Notice*, Channel 240A can be allotted to Healdsburg consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 6.4 kilometers (4.0 miles) west[1] of the community. The site restriction is required to avoid a short-spacing to a proposal to allot Channel 238A to Middletown, California,[2] and to Station KKHI-FM, Channel 239B, San Francisco, California. [3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Healdsburg, California	240A, 255B

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 240A at Healdsburg, California, will open on **January 11, 1991,** and close on **February 10, 1991.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 240A at Healdsburg are 38-37-47 and 122-56-04.

[2] Although consideration of Channel 238A at Middletown was denied in the context of MM Docket No. 88-491, 4 FCC Rcd 8315 (1989), reconsideration of that action is pending. Coordinates used for Channel 238A at Middletown are 38-45-12 and 122-36-54.

[3] Coordinates at the licensed site of Station KKHI-FM, Channel 239B, San Francisco, California, are 37-41-23 and 122-26-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-362

In the Matter of

Amendment of Section 73.202(b),	RM-6694
Table of Allotments,	RM-6893
FM Broadcast Stations.	
(Monroeville and Thomasville, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6471 (1989), issued in response to two separately filed petitions for rule making. The first proposal, issued in response to a petition filed on behalf of WJDB Radio, Inc. ("WJDB"), licensee of Station WJDB(FM), Channel 237A, Thomasville, Alabama, proposed the substitution of Channel 244C2 for Channel 237A and modification of its license accordingly (RM-6694). The second proposal, issued in response to a petition for rule making filed on behalf of Hub City Broadcasting Corporation ("Hub"), licensee of Station WYNI(AM), Monroeville, Alabama, proposed the allotment of Channel 237C3 to that community as its second local FM service (RM-6893).[1] Since the Monroeville proposal was made contingent upon Station WJDB vacating Channel 237A at Thomasville, the proposals were considered together.[2]

2. In response to the *Notice*, WJDB and Hub each filed supporting comments. Monroe Broadcasting Company, Inc. ("MBC"), licensee of Station WMFC-FM, Monroeville, Alabama, also filed comments, [3] as did Styles Caldwell ("Caldwell").[4] Hub filed reply comments.[5] Late comments were filed by Juanina, Inc. of Fort Walton Beach ("Juanina"), permittee of a new station on Channel 243C at Fort Walton Beach, Florida (BPH-900723IG).[6] Hub City filed additional comments.[7] WJDB also filed supplemental comments, that elicited an opposition by Arrow Communications of Alabama, Inc., to which WJDB responded.[8]

3. Juanina advises of a discrepancy existing in the Commission's data base at the time WJDB's proposal was filed, that directly affects the Thomasville request. Instead of reflecting Juanina's station as a Class C facility, the data base incorrectly listed it as a Class C1 station.[9] Juanina states that, as corrected, proposed Channel 244C2 at Thomasville is approximately 28 kilometers short-spaced to its construction permit for Channel 243C at Fort Walton Beach, Florida. In further support, Juanina observes that Section 73.202 of the Commission's Rules correctly identifies the Fort Walton Beach allotment as Channel 243C. *See* 47 CFR § 73.202(b).

4. WJDB's supplemental comments, filed in response to Juanina's allegations regarding the short-spacing between the Thomasville proposal and its station at Fort Walton Beach, does not concede to the accuracy of Juanina's statements, but rather offers an alternative to its original proposal in an effort to alleviate Juanina's concerns. WJDB seeks to modify its request to allot Channel 238C3 to Thomasville in lieu of Channel 244C2.[10] Although such maneuver may serve to resolve the noted conflict, it constitutes a late-filed counterproposal and cannot be considered in the context of this proceeding. Section 1.420(d) of the Commission's Rules, and the Appendix to the *Notice of Proposed Rule Making*, states that counterproposals will be considered only if advanced in initial comments. Moreover, were we to adopt WJDB's proposal now, our action might well be beyond the scope of the *Notice* in this proceeding, because potentially affected third parties were advised in the *Notice* of our procedure for considering counterproposals. *See Scranton and Surfside Beach, S.C.*, 4 FCC Rcd 2366 (1989). Therefore, WJDB's optional proposal will not be entertained in this proceeding.[11]

5. Hub, the only party to express an interest in the proposed allotment of Channel 237C3 to Monroeville, subsequently requested withdrawal of its proposal. Since no other interest in the proposal was expressed, it will be dismissed. Secondly, in view of the rights accorded to Juanina by the Commission for Channel 243C at Fort Walton Beach, Florida,[12] the Thomasville, Alabama, proposal for Channel 244C2 is technically unacceptable and likewise will be dismissed.

6. Accordingly, IT IS ORDERED, That the petitions for rule making filed by WJDB Radio, Inc. (RM-6694) and Hub City Broadcasting Corporation (RM-6893) ARE DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* also referenced that Channel 257C2 had been requested for allotment of Monroeville in RM-6695 as a co-channel upgrade of that petitioner's Class A facilities, and was being considered in a separate proceeding. Channel 257C2 was ultimately allotted to Monroeville, as requested. *See Report and Order*, MM Docket No. 89-542, 5 FCC Rcd 2811 (1990).

[2] The distance between Thomasville and Monroeville is 57 kilometers whereas 138 kilometers is required between Class A and C3 co-channels.

[3] MBC's comments related to its modification proposal for Station WMFC-FM at Monroeville. Since that proceeding has been resolved (*see* note 1, *supra*), its comments have been rendered moot in the context of this proceeding.

[4] Caldwell's comments state his interest in applying for Channel 244C2 at Thomasville. However, Caldwell's comments contravene the requirements of Section 1.52 of the Commission's Rules which requires that a requesting party, in the absence of counsel, sign and verify the document and state his/her address. Caldwell merely signed his comments. Although Caldwell did provide his address in a separate cover letter addressed to the Secretary, that document was not verified or served on the parties. Moreover, the certificate of service appended to Caldwell's comments was not dated. In the absence of a certified service date, Caldwell's comments do not comport with the requirements of Section 1.47 of the Commission's Rules. Therefore, Caldwell's comments are procedurally defective and will not be considered in this proceeding. *See Moscow, OH, et al.*, 4 FCC Rcd 3441 (1988).

[5] Hub's comments are moot to the extent that they relate to Caldwell's expression of interest.

[6] Juanina filed a motion to accept its late-filed comments. We have accepted these comments since they contain relevant information affecting the Thomasville proposal.

[7] Hub City's comments have been accepted for the limited purpose of recognizing its desire to withdraw from this proceeding. Since no other party expressed an interest in the Monroeville proposal, no prejudice will ensue from our action.

[8] WJDB's supplemental comments have been accepted for limited consideration, as discussed *infra*. Arrow, licensee of Station WFFX(FM), Tuscaloosa, Alabama, opposes consideration of WJDB's supplemental comments. In view of our ultimate disposition of WJDB's comments, *infra*, Arrow's comments are moot and will not be considered.

[9] Juanina observes that its application for Channel 243C had been in hearing with competing applications from 1982 until a grant by the Commission in June 1989. *See* 4 FCC Rcd 5064 (1989), *recon. denied*, 5 FCC Rcd 581 (1990). Because its granted application specified facilities less than the minimum now required for Class C status, Juanina amended its application to conform with the Commission's policy, as stated in its Public Notice of March 24, 1987, *Reclassification of FM Facilities Pursuant to BC Docket 80 - 90*, 2 FCC Rcd 2124 (1987):

> Applicants who applied before March 1, 1984, and were in hearing as of the close of business on March 2, 1987, and who were prevented from amending their applications to upgrade their facilities because of their status in hearing, will have 90 days after the decision in that proceeding becomes final to amend or be reclassified.

[10] WJDB claims that its amended proposal is made possible by the withdrawal of Hub's proposal to allot Channel 237C3 to Monroeville.

[11] WJDB has filed a separate proposal to allot Channel 238C3 to Thomasville, which we will consider in the context of RM-7444.

[12] *See* note 9, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

Freedom Communications, Inc. — File No. BPCT-870417KE

For a New Television Broadcast Station, Channel 30, Grants Pass, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1990; Released: November 28, 1990

By the Commission:

1. The Commission has before it for consideration: (1) an application filed by Freedom Communications, Inc. (Freedom), licensee of KTVL(TV) (channel 10, CBS), Medford, Oregon to construct a new television broadcast station on channel 30, Grants Pass, Oregon; (2) a petition to deny filed by Eugene Television, Inc. (Eugene), licensee of KVAL-TV (channel 13, CBS), Eugene, Oregon; and (3) related pleadings.

2. Grant of a permit to Freedom to construct and operate the proposed Grants Pass station will result in the overlap of the station's predicted Grade B contour with the Grade B contour of commonly owned KTVL(TV) in a manner inconsistent with Section 73.3555(a)(3) of the Commission's Rules (Rules).[1] Freedom proposes, however, to operate the Grants Pass station "primarily as a satellite."[2]

SATELLITE PROPOSAL

3. In support of its request, Freedom states that Grants Pass is a small community of 15,032 persons which has no locally licensed television station and which cannot support a full service television station. Freedom proposes to establish a television studio in Grants Pass which will originate local news, public affairs and other programming directed to the needs and interests of the viewers in that community and in Josephine County in which Grants Pass is located. Freedom anticipates that the news programming will be produced locally by the Grants Pass station, and then either broadcast by that station, or microwaved from it to KTVL(TV) for live broadcast and simulcast by the Grants Pass station. Freedom further notes that satellite television stations are common in the television markets surrounding its proposed Grants Pass station. Specifically, Freedom lists KPIC(TV), Roseburg, Oregon and KCBY-TV, Coos Bay, Oregon as satellites of KVAL-TV (CBS), Eugene, Oregon; KOTI(TV), Klamath Falls, Oregon as a satellite of KOBI(TV) (NBC), Medford, Oregon; and KDKF(TV), Klamath Falls, Oregon as a satellite of KDRV(TV) (ABC), Medford, Oregon.

4. As an additional justification for the proposed satellite operation at Grants Pass, Freedom contends that there is a competitive imbalance in the Medford, Oregon television market (which is ranked 152nd). In that regard, Freedom notes that many viewers in Josephine County (the second largest county in the Medford-Klamath Falls area of dominant influence (ADI)) do not receive an acceptable signal from KTVL(TV) because the Siskiyou Mountains (elevated peaks of up to 7,000 feet) intervene between KTVL(TV)'s transmitter on Mount Ashland in southern Jackson County, and Josephine County. The other Medford television stations, Freedom submits, broadcast unobstructed, clear signals into Josephine County because their transmitters are located in that county on King Mountain. Freedom also contends that KTVL(TV) is viewed significantly less by non-cable households because they must direct their antennae towards either Mount Ashland to receive the CBS network programming of KTVL(TV) or King Mountain to receive both NBC programming from KOBI-TV and ABC programming from KDRV-TV. Freedom submits that viewers predominantly select the latter programming from King Mountain. Viewership of the KTVL(TV) signal is further eroded, Freedom maintains, because cable penetration in Josephine County is only 48%, the lowest of the five counties comprising the Medford ADI.

5. With respect to the contour overlap between KTVL(TV) and the proposed Grants Pass satellite station, an independent consulting firm prepared an engineering study which Freedom submitted in support of its application. The study indicates that the predicted Grade B contour of the proposed Grants Pass satellite station encompasses 12,815 square miles and a population of 327,975 persons. The study further indicates that the predicted Grade B contour of KTVL(TV) encompasses 18,681 square miles and a population of 332,975 persons. The overlap area between the proposed Grants Pass station and KTVL(TV) would encompass 8,648 square miles and 222,166 persons, which represents 67% of the area and 68% of the population within the proposed satellite's Grade B contour, and 46% of the area and 67% of the population within KTVL(TV)'s Grade B contour. The study also shows Grade A overlap between the proposed Grants Pass station and KTVL(TV). However, Freedom claims that there is a substantial difference between the predicted and the actual Grade B service areas of KTVL(TV) and the proposed Grants Pass station because the Siskiyou Mountains intervene between Medford and Grants Pass. Although there is some reference to a terrain limiting impact on signal propagation in the general vicinity of Grants Pass and Medford areas, Freedom does not submit any engineering studies or exhibits which attempt to quantify the effect of the topography on the actual signal coverage and the resulting overlap of both the proposed Grants Pass station and KTVL(TV). As further evidence of the detrimental effects of the Siskiyou Mountains on signal propagation, Freedom insists that there are 60 or more television translator stations authorized to Medford television stations KDRV(TV), KOBI(TV) and KTVL(TV) that retransmit their signals.

PETITION TO DENY

6. With respect to Freedom's satellite proposal, Eugene disputes Freedom's alleged motives for its satellite operation in Grants Pass. Eugene asserts that, rather than to provide unobstructed television service to Grants Pass, the true motive for Freedom's proposal is to enable KTVL(TV) to broadcast an improved CBS network signal from King Mountain to 99,659 viewers in the Medford television market. This arrangement, Eugene contends, is in contravention of the Commission's satellite policy which discourages the operation of satellite stations merely to "fill-in" gaps in the parent station's contours. Eugene further alleges that the Grants Pass satellite station will also expand the coverage of KTVL(TV) to include Douglas County and will thereby duplicate the CBS programming presently being broadcast there by Eugene's satellite station KPIC(TV), Roseburg, Oregon.

DISCUSSION

7. The goals of our multiple-ownership rules are to promote economic competition and diversity of programming viewpoints. *See e.g., Multiple Ownership of Standard, FM and Television Stations*, 45 F.C.C. 1476, 1476-77, *reconsideration denied*, 45 F.C.C. 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 of Section 73.3555 of the Rules. What constitutes a sufficient showing for an exception to the duopoly rule for a satellite operation has been established by case law and involves a balance of various factors, including the degree of overlap between the stations, the capacity of the market to support a full-service station, the level of service available in the market, the financial difficulties of the stations involved, as well as other considerations. *See Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, FCC 90-279 (adopted August 1, 1990) paras 2, 10.

8. In this case, not only is there overlap between the predicted Grade B contours of the proposed Grants Pass station and KTVL(TV), the Grade A overlap is also substantial. The Grade B overlap constitutes 67% of the area and 68% of the population within the predicted Grade B contour of the proposed Grants Pass station. The extensive contour overlap between the proposed Grants Pass station and KTVL(TV) in Josephine and Jackson counties, and the duplication of CBS programming by both KTVL(TV) and KPIC(TV) in Douglas County results in significant spectrum inefficiency which is not outweighed by demonstrated public interests or service needs in Grants Pass. We note, in that regard, that there are four stations licensed to the Medford market (three commercial and one educational) which provide predicted Grade A service to Grants Pass, and several television translator stations which also provide service to that community. Thus, we believe that the policies underlying our multiple-ownership rules far outweigh the requested satellite exception to the rule.[3]

9. Additionally, we recognize that, potentially, the off-the-air reception of the KTVL(TV) signal in Josephine County might be degraded by the intervening mountainous terrain and could effect the competitive position of KTVL(TV) in the Medford market. However, there are other technical means of resolving such problems, including television translators and on-channel boosters. *See tvUSA/Pueblo, Ltd.*, 4 F.C.C. Rcd. 598 (MMB 1989), *affirmed* FCC 90-358 (adopted October 25, 1990). Moreover, Freedom does not claim that KTVL(TV) is presently experiencing any financial difficulty from its station operations. Also, the differences in the technical qualities and transmitter locations of competing television stations and the effects of the local terrain generally make strict competitive equality among all licensees nearly impossible. Thus, competitive inequality alone is not a basis for waivers of our rules and policies. Based on the foregoing reasons, we conclude that Freedom has failed to show that authorization of the proposed satellite operation at Grants Pass would be in the public interest.[4]

10. Accordingly, IT IS ORDERED, That the application (BPCT-870417KE) of Freedom Communications, Inc. to operate a television broadcast station on channel 30, Grants Pass, Oregon, IS DENIED, that the petition to deny filed by Eugene Television, Inc., IS GRANTED to the extent indicated above, and that the informal petition to deny filed by Sunshine Television, Inc., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 73.3555(a)(3) of the Commission's Rules provides that "no license for a television broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates or controls one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations...." However, Note 5 to section 73.3555 states that "paragraphs (a) through (d) of this Section will not be applied to cases involving television stations which are primarily 'satellite' operations." "[Such] cases willl be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

[2] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programming, but produces less than five percent of its programming locally. *See, e.g., Amaturo Group, Inc.*, 68 F.C.C. 2d 899 (1978).

[3] It is true, as Freedom contends, that several satellite stations operate in various communities within the Medford market. This fact alone, however, in no way alters or renders arbitrary our conclusion, based on the specific facts of this case and the application to those facts of relevant evaluative criteria, that satellite authorization is not warranted in this case.

[4] In view of our denial of Freedom's proposed satellite operation, we need not decide Eugene's contention that Freedom incorrectly represented that its proposed transmitter site on King Mountain would comply with the city grade service and line-of-sight provisions of Sections 73.685(a) and (b), respectively, of the Commission's Rules. However, we do note that Eugene has raised substantial questions with respect to these issues and to the sufficiency of Freedom's showing in support of its requested waiver. Our disposition of this matter is not to be

interpreted as a resolution of these issues on their merits. Also, Sunshine Television, Inc., licensee of KDRV(TV), Medford, Oregon filed an "Informal Petition to Deny" in which it alleges that Freedom's operation, as proposed in its amended application, will expose humans to high levels of radio frequency (RF) radiation. The engineering staff has examined Freedom's RF radiation exhibits and is persuaded that Freedom's proposed operation is in complete compliance with American National Standards Institute's standards. *See* Further Guidance For Broadcasters Regarding Radiofrequency Radiation And The Environment, FCC Public Notice, Mimeo No. 2278, January 28, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE
NETWORK, INC.,
Complainant,

v. File No. E-90-178

CONTEL OF
CALIFORNIA, INC.,
Defendant.

ERRATUM

Released: November 26, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

On November 9, 1990, the Commission released an Order in the above-captioned proceeding, DA 90-1594, adopted November 2, 1990, dismissing a complaint filed by Telesphere Network, Inc. against Contel of California, Inc. The Order inadvertently referenced the American Telephone and Telegraph Company.

The first paragraph IS CORRECTED to read as follows:

1. On November 22, 1989, Telesphere Network, Inc., (hereinafter "Telesphere") filed with the Commission the above-captioned formal complaint against Contel of California, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendant filed an answer to the complaint.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-565

In the Matter of

Amendment of Section 73.202(b), RM-7536
Table of Allotments,
FM Broadcast Stations.
(Deer River, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Radio Ingstad Minnesota, Inc. (petitioner), requesting the substitution of FM Channel 288C1 for Channel 288A at Deer River, Minnesota. Petitioner also requests modification of its construction permit for Station KXGP, Channel 288A, to specify operation on Channel 288C1.

2. We believe petitioner's proposal warrants consideration because the proposed substitution could provide a wide coverage area station to Deer River, Minnesota. Channel 288C1 can be allotted to Deer River, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site, which is located 30.1 kilometers (18.7 miles) east of the community.[1] Since Deer River is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government will be requested. We shall also propose to modify the construction permit for Station KXGP, Channel 288A, to specify operation on Channel 288C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Deer River, Minnesota	288A	288C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 14, 1991,** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington
David D. Oxenford
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 288C1 at Deer River are 47-23-00 and 93-24-10 with a site restriction 30.1 kilometers (18.7 miles) east of the community.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-439

In the Matter of

Amendment of Section 73.202(b), RM-6805
Table of Allotments,
FM Broadcast Stations.
(Ozark, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 31, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7106 (1989), proposing the substitution of FM Channel 280C3 for Channel 280A at Ozark, Alabama, and modification of the license of Sunrise Broadcasting Corp. ("Sunrise") for Station WNER(FM) to specify operation on the higher-powered channel.[1] Supporting and reply comments were filed by the former licensee. Companion Broadcasting Service, Inc.[2] ("Companion") filed comments and Sunrise filed supplemental comments. [3]

2. Companion supports the proposed allotment of Channel 280C3 to Ozark, but urges that unless a site restriction is imposed, thereby requiring Station WNER(FM) to relocate its transmitter site, Companion would be unable to operate Station WAAO-FM on Channel 279A at Andalusia, Alabama, from its intended site[4] with full Class A facilities (6 kW at 100 meters HAAT).

3. Although Sunrise's predecessor supported the operation of Station WNER(FM) as a Class C3 facility from its current site, Sunrise has acceded to Companion's request, based upon Sunrise's recent application for authority to relocate the transmitting facilities of Station WNER(FM) to a site 15.1 kilometers (9.4 miles) southeast of the community.[5]

4. A staff engineering analysis confirms that Channel 280C3 can be allotted to Ozark at the site specified in Sunrise's application, consistent with the minimum distance separation requirements of the Commission's Rules.

5. In view of the above, we believe that the public interest would be served by substituting Channel 280C3 for Channel 280A at Ozark, Alabama, since it would provide an expanded coverage FM service to the community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Sunrise for Station WNER(FM) to specify operation on Channel 280C3 in lieu of Channel 280A, as requested.[6]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Ozark, Alabama	280C3, 285A

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sunrise Broadcasting Corp. for Station WNER(FM), IS MODIFIED effective **January 7, 1991,** to specify operation on Channel 280C3 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, Morgan Broadcasting Limited Partnership was the licensee of Station WNER(FM). An assignment of the license to Sunrise Broadcasting Corp. (BALH-900424GH) was subsequently granted June 21, 1990.

[2] Companion is the licensee of Station WAAO-FM, Andalusia, Alabama. Although Companion currently operates on Channel 284A, it was directed to relocate to Channel 279A pursuant to MM Docket No. 86-455. *See* 2 FCC Rcd 7263 (1987).

[3] These comments, which advise us of the recent assignment of license of Station WNER(FM) from Morgan Broadcasting Limited Partnership to Sunrise, were accompanied by a request for leave to file and were served on Companion. The Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested. However, in this instance the comments reaffirm Sunrise's continuing interest in pursuing the modification proposal and address concerns

raised by Companion that were opposed by the former licensee of Station WNER(FM). We believe that acceptance of Sunrise's pleading will serve the public interest since it facilitates the resolution of this proceeding.

[4] Coordinates specified for Channel 279A at Andalusia are 31-20-27 and 86-28-02.

[5] Sunrise's application (BPH-900720IB) specifies a transmitter location at coordinates 31-23-46 and 85-30-01. Sunrise states that while the modified site is intended to accommodate its application to increase its operating power to 6 kW, it also can be utilized for Class C3 facilities on Channel 280 at Ozark. Additionally, use of Sunrise's specified site negates a short-spacing to Companion's proposed use of Channel 279A at Andalusia. The distance between the proposed modified site at Ozark and the site specified for Channel 279A at Andalusia is 92 kilometers whereas a distance of 89 kilometers is required between first adjacent Class A and C3 channels.

[6] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1990

COMMISSION SEEKS COMMENT ON COMPETITIVE TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR DECLARATORY RULING REGARDING AGGREGATORS OF INTEREXCHANGE TRAFFIC UNDER AT&T TARIFFS
Pleading Cycle Established

On September 7, 1990, Competitive Telecommunications Association (Comptel), an organization of interexchange carriers, filed a petition for declaratory ruling (petition) under Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2. The petition alleges that American Telephone and Telegraph Company (AT&T) has designed and promoted various interstate tariffs to facilitate so-called "traffic aggregators," ostensibly to purchase high volume discounted services and then, for a fee, resell them in smaller portions to end users who otherwise would not have sufficient volume to receive such discounts. The petition asserts that these aggregators are simply "shells," acting as a marketing arm of AT&T, to offer off-tariff discounts to selected customers in a discriminatory manner. The petition also challenges the tariff provisions establishing these aggregation services as vague, in violation of Sections 61.2 and 61.54(j), in that the status of the parties and terms of the transactions provided for in AT&T's tariffs are unclear, even to the parties themselves.

AT&T responds that, under relevant case law, the declaratory ruling provision of Section 1.2 is applicable only if the facts of the case are clearly developed and essentially undisputed. AT&T then argues that it does indeed dispute the clarity and accuracy of many of the explicit and implicit factual assertions in the petition, and that the petition is therefore procedurely inappropriate and should be dismissed. In reply, Comptel claims that, on the contrary, the factual issues are not in dispute, and it reiterates and expands upon its previous position. Moreover, Comptel adds to its request that the Commission place Comptel's petition on public notice to allow interested parties to comment on these issues of "industry-wide importance."

By this Public Notice, we waive, on our own motion pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, presently applicable time limitations for filing of comments and replies on this matter, and we invite interested parties to file comments regarding the Comptel petition, AT&T's response, and Comptel's reply no later than January 31, 1991. Reply comments may be filed no later than February 28, 1991.

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to International Transcription Service, Inc. (ITS), the Commission's duplication contractor, at its office in Room 246, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Gerald Chakerian, Tariff Division, Common Carrier Bureau, at (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2519, 2637, and 2642

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: November 15, 1990; Released: November 16, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2519, 2637, and 2642 to introduce Virtual Telecommunications Network Service (VTNS) Option 64 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for this option are stabilized throughout a three-year term. *See* AT&T Transmittal No. 2519, Description and Justification (D&J) at 1-4. The basic charge for VTNS Option 64 is $1,202,100 per month. However, if Option 64 is ordered before April 1, 1991, with an initial service date of no later than September 30, 1991, the basic charge will be reduced by $25,000 for the first three months following substantially complete installation. *See* AT&T Transmittal No. 2637 and AT&T Tariff F.C.C. No. 12, Section 7.66.2.A. Transmittals 2519, 2637, and 2642 are scheduled to become effective November 17, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or alternatively, to suspend and investigate Transmittal 2519 on September 4, 1990 and September 12, 1990, respectively. AT&T filed a reply on September 17, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 64 is an integrated service package that is "unlike" AT&T's other component services. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 64 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.13 billion and likely accounts for more than 2 percent of the entire interexchange market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Option 64 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. MCI contends that Option 64 bundles AT&T 800 service with other voice services and applies price and revenue discounts to the combined usage of the customer, thereby unlawfully conditioning the availability of the higher discounts on the combined use of voice services. MCI Petition at 2-3. MCI objects to the provision in Option 64 that permits a customer to make off-network to off-network calls through the use of authorization codes on the grounds that this is effectively the provision of ordinary MTS service among public switched network locations at preferential prices. *Id.* at 3-4. MCI also opposes the tariff provision permitting the Option 64 customer to specify and make calls between non-port and other locations. *Id.* at 3 n.4. Additionally, MCI maintains that Option 64 requires only revenue, and not volume, commitments. MCI argues that this does not give AT&T any assurance that a particular volume of traffic will be transmitted over its facilities. *Id.* at 4 n.5.

5. AT&T contends that the rates in Option 64 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Reply at 6. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 8-10 & 9 n. ***. AT&T also denies that it is unlawfully bundling 800 service with other voice services. *Id.* at 3-4. Finally, AT&T maintains that Option 64 does require customers to make a volume commitment. *Id.* at 5 n.*.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2519, 2637, and 2642, Sprint's and MCI's petitions, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2519, 2637, and 2642 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2519, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation, ARE DENIED.

9. IT IS FURTHER ORDERED, that Transmittal Nos. 2519, 2637, and 2642 take effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson;
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2561, 2565, and 2674

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: November 15, 1990; Released: November 16, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2561, 2565, and 2674 to introduce Virtual Telecommunications Network Service (VTNS) Options 66 and 67, respectively, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and for Option 67, specific international locations. Following substantially complete installation, the rates for these options are stabilized throughout a three-year term. These rates may be extended for a two-year period if the customer opts to do so and AT&T agrees. *See* AT&T Transmittal No. 2561, Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2565, D&J at 1-4. The basic charge for VTNS Option 66 is $53,900 per month, while the basic charge for Option 67 is $332,500 per month. *See* AT&T Transmittal No. 2561, D&J at 5; AT&T Transmittal No. 2565, D&J at 5. Transmittal Nos. 2561, 2565, and 2674 are scheduled to become effective November 17, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal Nos. 2561 and 2565 on September 26, 1990. AT&T filed a reply on October 5, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Options 66 and 67 are integrated service packages that are "unlike" AT&T's other component services. Further, Sprint contends that even if they could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 68 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittals also effectively restrict each offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Options 66 and 67 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. AT&T contends that the rates in Options 66 and 67 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Reply at 3. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 6-7 & 7 n.*.

5. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2561, 2565, and 2674, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2561, 2565, and 2674 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2561 and 2565, filed by US Sprint Communications Company Limited Partnership IS DENIED.

8. IT IS FURTHER ORDERED that Transmittal Nos. 2561, 2565, and 2674 take effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2576 and 2674

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: November 15, 1990; Released: November 16, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2576 and 2674 to introduce Virtual Telecommunications Network Service (VTNS) Option 68 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for this option are stabilized throughout a three-year term. *See* AT&T Transmittal No. 2576, Description and Justification (D&J) at 1-4. The basic charge for VTNS Option 68 is $354,600 per month. *Id.* at 5. Transmittals 2576 and 2674 are scheduled to become effective November 17, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal 2576 on September 26, 1990. AT&T filed a reply on October 5, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 68 is an integrated service package that is "unlike" AT&T's other component services. Further, Sprint contends that even if Option 68 could qualify as an integrated service package, the rates contained in the Option vary without justification from rates contained in other options under Tariff 12 and are thus discriminatory. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 68 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange telecommunications market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Option 68 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. AT&T contends that the rates in Option 68 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Reply at 3. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 6-7 & 7 n.*.

5. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2576 and 2674, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2576 and 2674 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2576, filed by US Sprint Communications Company Limited Partnership IS DENIED.

8. IT IS FURTHER ORDERED, that Transmittal Nos. 2576 and 2674 take effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-54

In the Matter of

Amendment of Parts 21, 43, 74, 78, and 94
of the Commission's Rules Governing the Use
of the Frequencies in the 2.1 and 2.5
GHz Bands Affecting:

Private Operational-Fixed Microwave Service
Multipoint Distribution Service,
Multichannel Multipoint Distribution Service
Instructional Television Fixed Service, and
Cable Television Relay Service

ORDER GRANTING EXTENSION OF TIME

Adopted: November 15, 1990; Released: November 15, 1990

By the Mass Media Bureau:

1. The Association for Higher Education of North Texas, the Indiana Higher Education Telecommunication System, Illinois Institute of Technology, Lousiana State University, Region IV Education Services, the State University of New Jersey (Rutgers), the Trustees of Leland Stanford Junior University, Transvideo, Inc., and the University of Texas Health Science Center, all licensees or permittees of stations in the Instructional Television Fixed Service, have requested an extension of time for comments and reply comments in the above-referenced Rule Making proceeding. Comments are currently due on November 26, 1990, and reply comments on December 19, 1990.

2. The parties claim that the number and complexity of the proposals in the *Further Notice of Proposed Rule Making* in Gen. Docket No. 90-54, as well as the length and complexity of the Commission's related *Report and Order* in Gen. Dockets Nos. 90-54 and 80-113, considered in light of impending school holidays of extended periods, make an extension necessary in order for educational institutions to participate effectively.

3. As also pointed out by the requesters here, the Commission has recognized the particular difficulties educational institutions face in responding speedily to issues of concern to them. Educational institutions will have their rights affected by the pending Rule Making, and their full participation is both important and desired. The extension of time requested should not prejudice other parties, and will be granted as requested. Accordingly, pursuant to authority in Sections 4(i), 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED, That the comment period in this proceeding IS EXTENDED to December 19, 1990, and the reply comment period IS EXTENDED to January 28, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-562

In the Matter of

Amendment of Section 73.202(b), RM-7525
Table of Allotments,
FM Broadcast Stations.
(Ballston Spa and Saratoga Springs,
New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 30, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Saratoga Radio Corporation ("petitioner"), licensee of Station WQQY(FM), Channel 272A, Saratoga Springs, New York, requesting the reallotment of Channel 272A from Saratoga Springs, New York, to Ballston Spa, New York, and the modification of Station WQQY(FM)'s license to specify Ballston Spa as its community of license. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner submits that under the provisions of Section 1.420(i) of the Commission's Rules, the reallotment of Channel 272A to Ballston Spa will result in a preferential arrangement of allotments. Further, it states that the allotment of Channel 272A at Saratoga Springs and Ballston Spa are mutually exclusive since the two communities are located approximately 9.4 kilometers (6 miles) apart while the Commission's Rules stipulate a minimum distance separation of 115 kilometers (71 miles) for co-channel Class A allotments. Petitioner points out that the reallotment of Channel 272A to Ballston Spa will provide the community with its first local commercial FM service but will not deprive Saratoga Springs of its only local aural transmission service because Saratoga Springs will continue to receive service from commonly-owned Station WKAJ(AM) and noncommercial educational Station WSPN.[1] Petitioner states that Ballston Spa, the seat of Saratoga County, has a population of 4,711 persons according to the 1990 Rand-McNally Road Atlas. Petitioner further states that Ballston Spa is incorporated, with its own local government, post office and zip code, police and fire departments, library and banking services. According to the petitioner, Station WQQY(FM), as now licensed to Saratoga Springs, is limited to facilities of 3 kW at 23 meters of height above average terrain and is unlikely to be able to improve its facilities because of spacing constraints to Station WEQX(FM), Channel 274B, Manchester, Vermont, and FAA tower height restrictions. Because of these constraints, as well as local zoning limitations, petitioner claims that any available fully spaced site is so far away from Saratoga Springs that the station could not provide all of the community with the required 70 dBu signal. Should Station WQQY(FM) be licensed as a Ballston Spa station, however, petitioner contends that the station will be able to increase its power to 6 kW and thus expand its coverage area from its present 1010 square kilometers, with a population of 91,712 persons, to 2526 square kilometers, with a population of 624,535 persons. An additional benefit of its proposal, according to the petitioner, is the elimination of a 12 kilometer short-spacing to second-adjacent Station WEQX, Channel 274B, Manchester, Vermont.

3. Channel 272A can be allotted to Ballston Spa in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.2 kilometers (8.8 miles) south of the community to avoid a short-spacing to Stations WJIV, Channel 270B, Cherry Falls, New York, and WEQX(FM), Manchester, Vermont, as well as to accommodate petitioner's desired transmitter site.[2] Canadian concurrence in the allotment is required since Ballston Spa is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We believe the proposal warrants further consideration. The proposal would not deprive Saratoga Springs of its only local broadcast service and the use of Channel 272A at Ballston Spa is mutually exclusive with its present allotment at Saratoga Springs. As requested, we also propose to modify petitioner's license for Station WQQY(FM) to specify Ballston Spa as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 272A at Ballston Spa or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ballston Spa, New York	–	272A
Saratoga Springs, New York	272A	–

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 14, 1991,** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard R. Zaragoza, Esq.
John Joseph McVeigh, Esq.
Fisher, Wayland, Cooper and Leader
1255 - 23rd Street, N.W., Suite 800
Washington, D.C. 20037-1125
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission now considers noncommercial educational service in determining the number of transmission services in a community. *See Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990).

[2] The coordinates for Channel 272A at Ballston Spa are North Latitude 42-52-44 and West Longitude 73-51-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-203

In the Matter of

Amendment of Section 73.202(b), RM-7228
Table of Allotments,
FM Broadcast Stations.
(Plymouth, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 2544 (1990), issued in response to a petition filed by Community Service Broadcasters, Inc. ("petitioner"), licensee of Station WNZE(FM),[1] Channel 232A, Plymouth, Indiana, proposing the substitution of Channel 232B1 for Channel 232A, and modification of its license to specify operation on the higher-powered channel. Joint supporting comments were filed by the petitioner and Nova. No opposing comments were received.

2. As indicated in the *Notice*, Channel 232B1 can be allotted to Plymouth, Indiana, at the petitioner's specified site, which is located 18 kilometers (11.2 miles) north of the community,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. In view of the above, we believe the public interest would be served by substituting Channel 232B1 for Channel 232A at Plymouth, Indiana, since it could provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WNZE(FM) to specify operation on Channel 232B1 in lieu of Channel 232A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Plymouth, Indiana	232B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Community Service Broadcasters, Inc., for Station WNZE(FM), Plymouth, Indiana, IS MODIFIED effective **January 7, 1991**, to specify operation on Channel 232B1 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An assignment of the license for Station WNZE(FM) from Community Service Broadcasters, Inc. to Nova Broadcasting, Inc. ("Nova") was granted March 22, 1990, but has not been consummated. *See* File No. BALH-900125HO.

[2] Coordinates at the petitioner's specified site for Channel 232B1 at Plymouth, Indiana, are 41-30-18 and 86-17-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-563

In the Matter of

Amendment of Section 73.202(b), RM-7444
Table of Allotments,
FM Broadcast Stations.
(Thomasville, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 30, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of WJDB Radio, Inc. ("petitioner"), licensee of Station WJDB(FM), Channel 237A, Thomasville, Alabama, seeking the substitution of Channel 238C3 for Channel 237A at Thomasville and modification of its license to specify operation on the higher powered channel.[1] Petitioner failed to state its commitment to apply for Channel 238C3 if it is allotted to Thomasville, and should correct the deficiency in response to this *Notice*. *See* paragraph 2 of the attached Appendix.

2. A staff analysis has determined that Channel 238C3 can be allotted to Thomasville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter is located at least 16 kilometers (10 miles) south of the community.[2]

3. We believe the public interest would be served by this proposal since it could provide Thomasville with an expanded coverage FM service. Moreover, since petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the facilities of Station WJDB(FM) without entertaining other expressions of interest.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Thomasville, Alabama	237A	238C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 14, 1991,** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd, Simpson & Miller, P.C.
1233 - 20th Street, N.W.
Suite 205
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although petitioner proposed this same change in the Table of Allotments in MM Docket No. 89-362, its proposal was dismissed in the context of that proceeding as constituting an untimely counterproposal.

[2] Coordinates at the restricted site for Channel 283C3 at Thomasville are 31-46-07 and 87-45-53. Although petitioner specified coordinates at 31-52-02 and 87-44-43, that site is short-spaced to an application filed by Station WFFX(FM), Channel 239C1, Tuscaloosa, Alabama, at coordinates 33-03-15 and 87-32-57. Although an applied for, but unauthorized transmitter site generally reflects a preference for a particular location and thus is not favored over the provision of a new service (*see Andalusia, AL*, 49 Fed. Reg. 32201, Aug. 12, 1984, and cases cited therein), the Commission will endeavor to accommodate all parties if other sites appear to be available. *See Ephrata, WA*, 4 FCC Rcd 307 (1989). This is especially true where, as here, the petitioner's proposal requires a transmitter relocation in any event to comply with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, and where, as in this instance, the proposal gives no indication that petitioner's site represents anything more than a mere preference.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-564

In the Matter of

Amendment of Section 73.202(b), RM-7469
Table of Allotments,
FM Broadcast Stations.
(Waynesboro, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 23, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Pioneer Radio FM, Inc. ("petitioner"), requesting the substitution of Channel 235C3 for Channel 235A at Waynesboro, Tennessee, and the modification of Station WTNR-FM's construction permit to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 235C3 for Channel 235A at Waynesboro, Tennessee, since it could provide the community with a wide coverage area FM service. Channel 235C3 can be allotted to Waynesboro in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station WTNR-FM's outstanding construction permit.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 235C3 in lieu of its present Channel 235A. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 235C3 at Waynesboro or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Waynesboro, Tennessee	235A	235C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 14, 1991,** and reply comments on or before **January 29, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eugene F. Mullin, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 235C3 at Waynesboro are North Latitude 35-14-04 and West Longitude 87-42-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID-PLAINS
TELEPHONE
COMPANY, INC.

Petition for Declaratory Ruling Regarding The Commission's Part 36 Separations Procedures — AAD 9-1939

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1990; Released: November 26, 1990

By the Commission:

I. INTRODUCTION

1. On October 30, 1989, Mid-Plains Telephone Company (Mid-Plains) requested that this Commission issue a declaratory ruling that Part 36 of this Commission's Rules, 47 C.F.R. Part 36, is the only valid jurisdictional separations methodology, and that the Wisconsin Public Service Commission (WPSC) used an inconsistent separations methodology in violation of the Communications Act of 1934. Mid-Plains therefore requests that this Commission issue an order preempting the WPSC's use of residual ratemaking in setting Mid-Plains's intrastate revenue requirement. For the reasons stated below, we deny Mid-Plains's petition.

II. BACKGROUND

2. Jurisdiction to regulate rates for common carrier communications services is divided between federal and state regulators. To implement dual regulation, carrier revenues, investment, and expenses must be apportioned between the interstate and intrastate jurisdictions. That apportionment process is generally known as jurisdictional separations. Section 221(c) of the Communications Act authorizes this Commission to prescribe separations procedures for telecommunications carriers:

> For purposes of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the commission may prescribe.[1]

A. Pre - Divestiture Separations and Settlements

3. The Commission did not formally exercise the powers conferred by Section 221(c) during the first three decades of FCC regulation. During that period, the Commission relied primarily upon "continuing surveillance" to achieve compliance with the telephone companies' obligation to establish "just and reasonable" rates for interstate services. AT&T periodically submitted data for Commission review, including information with respect to the separations methods AT&T used to compute its interstate rate of return. Changes in separations procedures during that period were usually accomplished through negotiations among state and federal regulators, AT&T, and independent telephone companies. Although FCC acquiescence was a precondition for a change in separations methods, that acquiescence was not reflected in formal FCC orders prescribing or approving particular separations procedures during the "continuing surveillance" period.

4. In the early 1940's, AT&T implemented a major change in the separations procedures used by its associated Bell System companies. AT&T began to allocate a portion of the investment and expenses attributable to local switchboards, subscriber lines and customer premises wiring and equipment to interstate services;[2] this was known as the "station-to-station" method. This "station-to-station" method replaced the "board-to-board" method, which attributed facilities from one long distance switchboard to another to toll services and attributed facilities from the local operator switchboard to the telephone instrument to local service. [3]

5. In 1947 the National Association of Regulatory Utility Commissioners (NARUC) issued a *Separations Manual*.[4] The *Separations Manual* provided for the assignment of each company's telephone plant costs into categories. The costs in each category were then allocated between the jurisdictions based on measurements of the use of the plant in each jurisdiction.[5]

6. AT&T used *Separations Manual* categories to identify interstate expenses and investment for distribution of interstate revenues to its associated companies. Thus, each associated Bell System company received revenues based on that company's cost of providing interstate service. With the independents, AT&T distributed interstate revenues under a system of "settlements". The larger independents received their settlements on much the same basis as the Bell companies. Many smaller independents, however, received their settlements on the basis of negotiated formulae that did not use the *Separations Manual* categories to identify each company's interstate costs. These formulae eventually developed into "average schedules".

7. The Commission did not prescribe or formally approve any of the pre-divestiture arrangements (Bell System division of revenues, cost company settlements, average schedule settlements) for the division of interstate revenues. The settlement payments were, however, reflected in AT&T revenue requirement computations, and the Commission did not require any adjustments. The Commission could, and presumably would, have ordered adjustments if the Commission had found that any settlement arrangement produced excessive or inadequate compensation for independents.

8. The Commission formally endorsed the use of the *Separations Manual* with certain modifications to compute the AT&T interstate revenue requirement in the Docket No. 16258 proceeding.[6] The Commission subsequently conducted a Rule Making proceeding which resulted in a decision that the NARUC - FCC *Separations Manual* should be incorporated by reference as Part 67 of the Commission's Rules.[7] Further revisions of the *Separations Manual* were adopted by the Commission in Rule Making proceedings after receiving the recommendations of Joint Boards composed of FCC Commissioners and state commissioners nominated by NARUC.[8]

9. When the Commission adopted certain revisions recommended in 1983 by the CC Docket 80-286 Joint Board, the Commission decided to codify the *Separations Manual* as revised instead of incorporating the Manual by reference.[9] The entire Manual was reformatted to conform with Federal Register requirements, but the codification did not result in any substantive changes apart from the particular revisions recommended by the Joint Board. The Manual was subsequently rewritten to achieve conformity with the new Uniform System of Accounts; Part 67 was repealed at that time and the revised *Separations Manual* was adopted as Part 36 of the Commission rules.[10]

B. Access Charges

10. In CC Docket 78-72 the Commission decided to replace the settlements/divisions of revenues process for compensating exchange carriers for originating and terminating AT&T interstate calls, as well as other arrangements for "access" compensation, with a system of carrier's carrier access charges that would be paid by all interexchange carriers.[11] The Commission adopted detailed rules for the computation of access charges that generally reflected exchange carrier costs apportioned to interstate operations through the procedures prescribed in the *Separations Manual*.

11. The access charge rules did not, however, require average schedule companies to follow those same procedures in order to compute the access compensation those companies would receive. Section 69.606 (a) of those rules provided that average schedule companies would be compensated for interstate access from a pool administered by a new association, the National Exchange Carriers Association (NECA), and that the compensation would be based upon a formula that "shall be designed to produce disbursements to an average schedule company that would simulate the disbursements that would be received pursuant to Section 69.607 by a company that is representative of average schedule companies." Thus, the access charge rules not only signified Commission acceptance of the average schedule settlement system, but mandated a continuation of average schedule settlements with certain modifications.

12. The *Access Charge Order* explained that the access charge rules were designed to minimize burdens upon smaller companies. In order to further that purpose, the Commission created NECA to perform tariff preparation and pool distribution functions and designed requirements to "adapt the existing average schedule settlements procedures to an access charge system."[12] The *Access Charge Recon. Order* also described that purpose: "[w]e incorporated a modified version of the existing average schedule arrangement into the access charges rules in order to avoid imposing the burden of developing cost information upon companies that may be too small to meet that burden."[13]

C. Mid - Plains Ratemaking

13. State regulators have normally followed procedures described in the many versions of the *Separations Manual* to compute an intrastate revenue requirement and establish intrastate rates for BOCs and independent telephone companies that are cost companies. A number of states, in regulating average schedule companies, use the average schedule settlement as the company's separated interstate portion, with the remainder of company costs on the books, as adjusted by the individual public utility commission, used for setting the company's intrastate revenue requirement. This process is called "residual ratemaking".[14]

14. Mid-Plains, as an average schedule company, receives its compensation for interstate service from NECA under the average schedule settlement system. The WPSC now requires Mid-Plains to set its intrastate rates based upon the residual ratemaking method. On February 11, 1988, Mid-Plains filed a Petition for Declaratory Ruling with the WPSC claiming that the WPSC did not have authority to regulate average schedule companies by using the residual ratemaking method. The WPSC held hearings and issued an Order denying Mid-Plains's request to have that company's intrastate rates determined on the basis of its intrastate costs, as determined by a cost study performed pursuant to Part 36.[15] Instead, the WPSC required Mid-Plains to use the intrastate amount determined through the use of residual ratemaking.

15. In response, Mid-Plains filed a complaint seeking a declaratory judgment with the United States District Court for the Western District of Wisconsin.[16] On July 26, 1989, the district court dismissed the complaint, most notably, under the doctrine of primary jurisdiction.[17] After dismissal of the case, the WPSC required compliance with its original Order. On August 18, 1989, Mid-Plains sought a rehearing and modification of the compliance requirement. The WPSC denied that petition. Mid-Plains then filed the subject Petition for Declaratory Ruling with this Commission on October 30, 1989.

III. THE PARTIES' POSITIONS

A. The Mid - Plains Filing

16. The Mid-Plains filing[18] requests that we find the WPSC's use of residual ratemaking to determine Mid-Plains's intrastate revenue requirement inconsistent with Part 36. Moreover, Mid-Plains requests that we declare Part 36 to be the only valid separations methodology for the separation of interstate and intrastate costs, preempting the use of residual ratemaking by the WPSC. Mid-Plains asserts that, although it is an average schedule company, a state commission must use a Part 36 cost study in determining all exchange carriers' intrastate revenue requirements.

17. Mid-Plains, after noting the Commission's role in separations under Section 410(c) of the Act[19] and the adoption of Part 36 under the procedural requirements set forth in 410(c)[20], observes that the Federal-State Joint Board recommending the adoption of Part 36 stated that Part 36 (then Part 67) was applicable to all carriers.[21]

Moreover, Mid-Plains contends, average schedules were not adopted under the procedures set forth in §410(c), and "thus could not be a valid separations procedure under any circumstance."[22]

18. Mid-Plains argues that, not only are average schedules not a valid separations method because of procedural deficiencies, but also that average schedules have never purported to be a separations method. The use of residual ratemaking, contends Mid-Plains, results in an intrastate revenue requirement which is not equal to, or even based on, the level of costs for the provision of its intrastate services as determined under Part 36.

19. Mid-Plains also states that no state commission may undertake a separation of costs inconsistent with Part 36.[23] Mid-Plains contends that the U.S. Court of Appeals for the Ninth Circuit addressed the issue of inconsistent state separations methods, and found such action violates the separations procedures prescribed by the Commission.[24] Concluding that any inconsistency with Part 36 requires preemption, Mid-Plains states that the WPSC's action is preempted by operation of federal law and the Supremacy Clause of the United States Constitution.[25]

20. Finally, Mid-Plains argues that approval of residual ratemaking could adversely affect the Commission's decision in CC Docket 87-313, the price cap proceeding.[26] Mid-Plains contends that this Commission, in the price cap proceeding, recognized that average schedules operate to create similar incentives to those created by price cap regulation.[27] Therefore, Mid-Plains states, the unrestrained state subsidization of intrastate rates and/or policies deviating from Part 36 would adversely impact this Commission's price cap goals.

B. Comments on Mid - Plains's Petition

21. By *Public Notice* released November 22, 1989[28] this Commission invited comments on Mid-Plains's petition. Two parties, a group of Tennessee telephone companies[29] (the Tennessee LECs) and the United States Telephone Association (USTA) expressly support Mid-Plains's petition. The Tennessee LECs, in their initial filings on this matter,[30] argue that state regulators are unlawfully interfering with federal authority over interstate telecommunications services by using the residual ratemaking method, thereby preventing LECs from earning interstate revenues to which they are entitled. Moreover, the Tennessee LECs express concern over the possibility that the residual method could be applied to any interstate regulatory scheme, including price caps.

22. In their December 5, 1989 comments, the Tennessee LECs argue that the states have no authority to establish any jurisdictional separations method, and must follow the separations procedures established by the Commission, in accordance with §410(c). The Tennessee LECs contend that only Part 36 has been adopted in accordance with §410(c). In addition, the Tennessee LECs conclude that there is no evidence that the Commission contemplated that "Part 36 would not be applicable to all situations requiring the use of separations procedures."[31] Enactment of §410(c), according to the Tennessee LECs, was a result of Congress' intent to curb state authority. USTA suggests that average schedules were never intended to separate costs, but merely to compensate for interstate costs and risk.

23. The National Telephone Cooperative Association (NTCA) contends that this Commission must find a means by which the public interest in reasonable rates in both jurisdictions is furthered, while accommodating the tension in dual jurisdictional regulation and preserving our position of final authority on separations procedures. Also, NTCA states that the WPSC does not adequately consider the public interest purpose served by the average schedule system nor the purpose of uniformity of procedures in the ratemaking process, specifically the binding nature of action taken in accordance with §221(c).

24. An overwhelming majority of the parties filing initial comments favoring the residual method[32] state that equitable regulation of average schedule companies is possible only by the use of residual ratemaking. They contend that residual ratemking is necessary to prevent average schedule carriers from recovering more than one hundred percent of their total costs. The FPSC sums up the feeling expressed by the parties opposed to the Mid-Plains petition: "[w]hat should prevail in this circumstance is what is most reasonable and equitable. Permitting a local exchange company to recover more than 100% of its combined costs is neither."[33]

25. Several parties favoring residual ratemaking state that overrecovery of full costs disturbs the long-held principle of uniformity in the separations process. Uniformity requires that the same method used to separate costs in one jurisdiction be used in the other jurisdiction to ensure recovery of a cost, but only once. The WPSC argues that the purpose of separations is to ensure uniformity.[34] Moreover, the TPSC states that uniformity is the whole basis for preemption of state law.[35]

26. A number of the parties favoring the use of residual ratemaking state that Mid-Plains does not present a preemption issue because nothing in the Commission's rules prevents a state from using the residual ratemaking method.[36] Moreover, the WPSC contends that this Commission has stated that the use of average schedules is justified as a means of approximating interstate costs,[37] thus supporting WPSC's position for the use of residual ratemaking.

27. The TPSC contends that this Commission prescribed two methods of separating jurisdictional costs -- Part 36 and average schedules.[38] Using average schedule settlements for separating costs, the TPSC argues, is not an illegal method of separations because the use of Part 36 criteria in determining the Part 69 average schedules would necessarily come within the purview of the law requiring separations procedures to be adopted by a Federal-State Joint Board.[39] Moreover, the reciprocal nature of costs dictates the use of residual ratemaking with average schedule companies because average schedules approximate the result produced through the cost study method.[40]

28. Several commenters state that granting Mid-Plains's petition would interfere with a state's right to set intrastate rates. The MoPSC contends that preemption of the residual ratemaking method would restrict a state's authority to investigate a carrier's total books. NARUC suggests that preemption of residual ratemaking would violate Section 2(b) of the Act and would deny states the ability to use alternative methods of calculating intrastate costs, a right guaranteed by the dual regulatory scheme.[41] NARUC, as well as several other parties favoring residual ratemaking, also cites a letter from the Chief, Common Carrier Bureau to counsel for TPSC as evidence of the Commission's position of noninterference in intrastate

ratemaking.[42] Also, NARUC and TPSC argue that the United States Court of Appeals for the District of Columbia has implicitly approved the residual ratemaking methodology,[43] and NARUC notes the recent adoption by that organization of resolutions regarding the ability of average schedule companies to recover greater than 100% of their full costs.[44]

29. WPSC disputes Mid-Plains's suggestion that it is appropriating interstate costs for intrastate purposes, because average schedules approximate interstate costs. Finally, NARUC contends that cost savings resulting from the use of average schedules will be lost if a cost study is performed by average schedule companies for intrastate costs.

C. Reply Comments[45]

30. The Tennessee LECs assert that the only question before the Commission is the legal issue of whether Congress, in defining the limits of the intrastate jurisdiction through the enactment of §410(c), has preempted states' deviation from Part 36. The Tennessee LECs argue that there can be no "double counting", as contended by the TPSC, because average schedules are not based on company-specific costs; therefore, there are no interstate costs to count. Moreover, the Tennessee LECs contend that an average schedule company cannot receive excessive interstate earnings, as suggested by NARUC, because as a matter of law average schedule companies do not receive excessive earnings if properly receiving interstate average schedule settlements.[46]

IV. DISCUSSION

31. Mid-Plains asks this Commission to declare that Part 36 procedures are the only valid method for separating a local exchange carrier's (LEC's) total costs to determine the intrastate revenue requirement. We conclude that the Commission has never prescribed Part 36 as a separations methodology for average schedule companies. Moreover, we find no Commission action prescribing a separations methodology for average schedule companies. Therefore, we cannot rule that Part 36 conflicts with the WPSC's use of residual ratemaking in setting Mid-Plains's intrastate revenue requirement, nor can we find that the WPSC has otherwise contravened the Communication Act or this Commission's rules or policies.

32. Part 36, as an outgrowth of the 1947 *Separations Manual* and Part 67, cannot be construed to apply to all exchange carriers. The actions and inactions of all carriers and state and federal regulators during the pre-divestiture period demonstrate that the *Separations Manual* did not apply to average schedule companies. Bell System settlements with those companies did not reflect detailed separation studies described in the *Separations Manual*.[47] The FCC accepted AT&T interstate revenue requirements that reflected such settlements, and many, perhaps most, state commissions used residual ratemaking in establishing or accepting intrastate rates of average schedule companies. The adoption of Part 69 rules that incorporate a modified version of average schedule settlements confirms the premise that average schedule companies were not subject to the then Part 67 (now Part 36) separations requirements. The Part 69 provisions, which provide interstate access compensation for average schedule companies that is not based upon separations studies, would have conflicted with any requirement that average schedule companies perform the separations studies described in the *Separations Manual*.

33. We are not persuaded by Mid-Plains' argument that the current Part 36 must apply to average schedule companies because a Joint Board said that it was recommending separations procedures for "all" carriers. Mid-Plains apparently refers to a statement in which the Joint Board recommended "that all carriers be required to use a modified version of the Class B Manual."[48] The word "all" was used in that context to mean both Class A and Class B cost companies. The *New Part 36 Joint Board Decision* does not discuss average schedule companies, and does not suggest that the Joint Board intended to impose any new requirements on those companies or that the Joint Board was recommending any action that would or could affect residual ratemaking.

34. The Commission's consistent view of "average schedule companies"[49] confirms that the Commission has not prescribed Part 36 for such companies even though there is no explicit exemption for average schedule companies in Part 36. The Commission assumes that average schedule companies, because of their small size, do not "have sufficient financial resources or expertise to justify a requirement that they perform jurisdictionally separated cost studies."[50] The Commission has continuously maintained that the average schedule companies are allowed to receive their interstate compensation on the basis of average schedules because of their supposed inability to perform these costly separations cost studies.[51] Moreover, average schedule companies, as specified in Part 69, receive compensation for their interstate services, based, not on their costs, but on the basis of average schedules.[52] Thus, established definitive parameters and rules regarding average schedule companies show the inconsistency between Part 36 and average schedules and confirm that Part 36 does not apply to average schedule companies.[53]

35. We further note that the Commission conducted a Rule Making in 1987 to conform the Part 69 access rules with the revised accounting and separations rules.[54] In that proceeding the Commission neither proposed nor adopted any changes in average schedule pool distributions. The *Average Schedule Further Recon. Order*, adopted a few months after the adoption of Part 36, also confirmed that this Commission still viewed Part 36 as exempting average schedule companies:

> Parts 31, 32, 36, 67 and 69 of our rules implement cost study principles that apply to the vast bulk of interstate exchange carrier assets, expenses and revenues. *See* 47 C.F.R. Parts 31, 32, 36, 67 and 69. Average schedule settlements represent a limited departure, for small exchanges with similarly limited or non-existent cost study experience, from the general principle that interstate exchange carrier compensation is to be based upon the actual interstate costs that are determined for each recipient carrier.[55]

36. The above history amply evidences Commission intent not to prescribe Part 36 for average schedule companies. A review of court holdings is likewise indicative of the general acceptance of this procedure in the industry. The U.S. Court of Appeals for the District of Columbia Circuit has reviewed the Part 69 average schedule rules on numerous occasions, and has consistently noted that

the Commission's purpose for allowing the use of average schedules is to avoid imposing the costly burden of developing jurisdictionally separated cost studies upon small LECs.[56] Moreover, in reviewing Commission rules affecting average schedule companies, that court has not hesitated to remand those rules that it believed were not consistent with the Commission's stated purpose for allowing the use of average schedules.[57]

37. As noted by NARUC and the TPSC, *Alltel* is consonant with their position. The *Alltel* court reviewed a Commission rule which required affiliated exchange carriers with $40 million or more in combined revenues to receive their interstate revenues on the same basis. The Commission had determined that the rule was needed to prevent abuses that might occur if a parent company were allowed to treat some affiliates as cost companies while using the average schedules for others.[58] The court, in remanding the case to the Commission for further proceedings,[59] questioned the Commission's assumption "that the lower interstate recovery that companies are supposed to be avoiding [by using average schedules] would not, in any event, be offset by the correspondingly higher intrastate revenues that petitioners contend would result from *residual state ratemaking*. "[60] (emphasis added). Thus, the court acknowledged the use of residual ratemaking by the states and considered the practice significant in preventing the problem which the Commission was addressing when it promulgated the rule.

38. In addition, it has always been our view as a matter of public policy that it would be inequitable for a company to recover more than its total costs. In fact, this Commission has previously declared that " [n]o company has a legal or equitable right to obtain more than its full costs."[61]

39. In summary, we conclude that this Commission has not prescribed any jurisdictional separations method for average schedule companies,[62] and the WPSC's use of residual ratemaking for determining Mid-Plains' intrastate revenue requirement does not contravene the Communications Act or any rule of this Commission. Mid-Plains has not presented a preemption question because the WPSC has not taken any action that conflicts with any federal law, rule or policy.

V. ORDERING CLAUSE

40. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i), 201(a), 221(c), and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(a), 221(c), Section 554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), and Rule 1.2 of the Rules of the Commission, 47 C.F.R. §1.2, Mid-Plains' request for a declaratory ruling preempting WPSC's use of residual ratemaking for determining Mid-Plains' intrastate revenue requirement IS DENIED.

41. IT IS FURTHER ORDERED, that the Tennessee LECs' Petition for Declaratory Ruling IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 221 (c).

[2] *See* Richard Gabel, *Development of Separations Principles in the Telephone Industry*, 44 (1967).

[3] This change came after the Supreme Court rejected the "board-to-board" method in *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930).

[4] The Commission did not formally prescribe or approve the *Separations Manual* at the time of its issuance.

[5] American Telephone & Telegraph Co. and the Associated Bell System Companies, Charges for Interstate and Foreign Communication Service, *Interim Decision and Order*, 9 FCC 2d 30, 93 (1967) (*Docket 16258 Order*), *recon.*, 9 FCC 2d 960 (1967), *Memorandum Opinion and Order*, 11 FCC 2d 493 (1968).

[6] *Docket 16258 Order*, *supra*.

[7] Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes, and Reserves between the Intrastate and Interstate Operations of Telephone Companies, *Report and Order*, 16 FCC 2d 317 (1969).

[8] Section 410(c) of the Communications Act was added in 1971 to require that such a Joint Board procedure be used in "any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations." 47 U.S.C. §410(c).

[9] Jurisdictional Separations Procedures, Amendment of the Commission's Rules and Establishment of a Joint Board, CC Doc. 80-286, 49 Fed. Reg. 7934 (March 2, 1984).

[10] Amendment of Part 67 (new Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, *Report and Order*, 2 FCC Rcd 2639 (1987) (*New Part 36 Order*), *recon. granted in part*, 2 FCC Rcd 5349 (1987) and 3 FCC Rcd 5518 (1988).

[11] MTS and WATS Market Structure, Phase I, *Third Report and Order*, 93 FCC 2d 241 (1983) (*Access Charge Order*), *recon.*, 97 FCC 2d 682 (1983) (*Access Charge Recon. Order*), *mod. on recon.*, 97 FCC 2d 834 (1984), *aff'd in part and remanded in part sub nom.* National Association of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (1984) (*NARUC*), *cert. denied*, 469 US 1227 (1985), *mod. on further recon.*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *aff'd on further recon.*, 102 FCC 2d 849 (1985).

[12] *Access Charge Order*, 93 FCC 2d at 339.

[13] *Access Charge Recon. Order*, 97 FCC 2d at 760.

[14] Several parties describe this ratemaking method as ratemaking on a "total company" basis, but we will describe it as "residual ratemaking" throughout this document.

[15] Petition for a Declaratory Ruling Concerning the Authority of the Commission to Regulate Average Schedule Companies on a Total Company Basis, *Findings of Fact, Conclusions of Laws and Final Order*, Doc. No. 3650-DR-100 (March 14, 1989).

[16] Mid-Plains Telephone Co., Inc. v. Public Service Commission of Wisconsin, Case No. 89-C-0318-S (W.D. Wis. March 29, 1989). Mid-Plains also sought to enjoin the WPSC from enforc-

ing that Commission's Order. However, the WPSC and Mid-Plains negotiated a settlement before the court could rule on the injunctive relief sought.

[17] The court dismissed Mid-Plains's Commerce Clause and Equal Protection claims with prejudice on the ground of lack of jurisdiction under the Johnson Act, 28 U.S.C. §1352. However, the court dismissed the preemption claim without prejudice under the doctrine of primary jurisdiction, to afford Mid-Plains the opportunity to petition this Commission for a ruling on the WPSC's use of residual ratemaking. *See* 47 C.F.R. §1.2.

[18] The Mid-Plains filing consists of a Petition for Declaratory Ruling (Petition), a Memorandum of Law in Support of Mid-Plains's Petition for Declaratory Ruling (Memo), and a Motion for Expedited Treatment (Motion).

[19] This Commission has final authority to prescribe the separations methodologies for determining interstate and intrastate costs. 47 U.S.C. §221(c), §410(c).

[20] Petition at 8, *citing New Part 36 Order*, *supra* at n. 10.

[21] Petition at 8, *citing* Amendment of Part 67 (new Part 36) of the Commission's Rules and establishment of a Federal-State Joint Board, *Recommended Decision and Order*, 2 FCC Rcd 2582 (1987) (*New Part 36 Joint Board Decision*).

[22] Petition at 10.

[23] Memo at 2, *citing* Establishment of Interstate Toll Settlement and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission, *Memorandum Opinion and Order*, 93 FCC 2d 1287 (1983), *recon. den.*, 98 FCC 2d 777 (1984), *aff'd sub nom.* State Corp. Comm'n of Kansas v. FCC, 787 F.2d 1421 (10th Cir. 1986). Mid-Plains also contends that the legislative history of §410(c) supports its position by stating that the Joint Board's decision is equivalent to an examiner's opinion. 1971 U.S. Code Cong. & Admin. News 1511, 1514.

[24] Hawaiian Telephone Co. v. Public Utilities Comm'n of the State of Hawaii, 827 F.2d 1264 (9th Cir. 1987) (*Hawaiian Tel.*), *cert denied*, 108 S.Ct. 2870 (1988).

[25] Memo at 11.

[26] Motion at 3, *citing* Policy and Rules Concerning Rates for Dominant Carrier, *Report and Order*, 4 FCC Rcd 2873 (1989).

[27] Motion at 3.

[28] Mid-Plains Telephone Company, Inc. Files Petition for Declaratory Ruling Regarding the Commission's Part 36 Separations Procedures, *Public Notice*, 4 FCC Rcd 8272 (Com. Car. Bur. 1989).

[29] The Tennessee LECs are comprised of Alltel Tennessee, Inc., Crockett Telephone Company, Ooltewah-Collegedale Telephone Company, Peoples Telephone Company, and West Tennessee Telephone Company. With the exception of Ooltewah-Collegedale Telephone Company, all of those LECs presented in a Tennessee Public Service Commission proceeding the same issue as that presented by the Mid-Plains petition. *See* Re: Alltel Tennessee, Inc., *Order*, 100 P.U.R.4th 253 (1989) (*TPSC Order*).

[30] *See* Tennessee LECs' Petition to Intervene or In the Alternative Petition to Consolidate, filed November 16, 1989, pp. 7-8. The Tennessee LECs' petition, received prior to the November 22, 1989 *Public Notice*, also requested a declaratory ruling on issues identical to those presented by the Mid-Plains petition. We did not issue a Public Notice on the Tennessee LECs' request because of the identity of issues between Mid-Plains's and the Tennessee LECs' requests. Our decision herein resolves the issues raised in the Tennessee LECs' request, and accordingly we dismiss their petition for declaratory ruling as moot.

[31] Tennessee LECs' Comments, Exhibit A at 7-8. USTA also contends that under *Hawaiian Tel.*, the WPSC should be required to use the Part 36 separations method adopted by the Commission.

[32] The parties filing initial comments favoring the use of residual ratemaking are the Florida Public Service Commission (FPSC), the Missouri Public Service Commission (MoPSC), the National Association of Regulatory Utility Commissioners (NARUC), the Tennessee Public Service Commission (TPSC), the Public Service Commission of West Virginia (WVPSC) and WPSC.

[33] FPSC's Comments at 3.

[34] In addition, several parties suggest that the lack of uniformity defeats the purpose of average schedules -- to avoid the costs entailed in performing a cost study. *See e.g. TPSC Order*, 100 P.U.R.4th at 260; NARUC's Comments at 3.

[35] The TPSC states, "the reason for federal preemption in the separations field is to ensure that federal and state regulators follow uniform allocation procedures. It is the only way to make sure that all costs are counted once - but only once - in the separations process." *TPSC Order*, 100 P.U.R.4th at 261.

[36] The WPSC contends that not "one word from Part 36 . . . addresses, much less forbids, state residual ratemaking for average schedule companies." WPSC's Comments at 7. The FPSC also contends that its position is "when a company elects to participate on an average schedule basis at the interstate level the residual or 'total company' methodology is not inconsistent with the Communications Act of 1934." FPSC's Comments at 2. *See also* MoPSC's Comments at 4.

[37] WPSC's Comments at 22, *citing Access Charge Recon. Order*, *supra* at n.11.

[38] NARUC also agrees with this viewpoint, stating that average schedule settlements are used by this Commission as a substitute for Part 36 cost studies. WVPSC says that "[because the WVPSC believes carriers should] not exceed a reasonable rate of return on a total company basis, . . . average schedule companies which are receiving interstate revenues that are not specifically tailored to a Part 36 based revenue requirement [must] be regulated on a residual basis at the intrastate level." WVPSC's Comments at 1.

[39] *TPSC Order*, 100 P.U.R.4th at 261, n.12.

[40] The TPSC states that any contention that average schedules are revenues unrelated to costs is incorrect because average schedules estimate costs, costs determine rates, and rates produce revenue. *Id.* at 262. *See also* WPSC's Comments at 24 (arguing that a claim that average schedule payments are merely settlements unrelated to jurisdictional interstate costs ignores the constitutional requirement that the Commission is limited to the recovery of interstate costs).

[41] NARUC cites Louisiana PSC v. FCC, 476 US 355 (1986), which found that states are not required to follow the FCC's depreciation practices for intrastate ratemaking. NARUC contends that this decision also supports the theory that the determination of intrastate costs is left to the states in intrastate ratemaking.

[42] *See* Letter from Gerald Brock, Chief, Common Carrier Bureau to Henry Walker, Esq., counsel for the Tennessee Public Service Commission, dated December 2, 1988.

[43] These parties cite Alltel Corporation v. FCC, 838 F.2d 551 (D.C. Cir. 1988) (*Alltel*).

[44] NARUC's Comments at Appendices A and B.

[45] The Michigan Public Service Commission (MPSC), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and the TPSC also filed reply comments. The comments of these parties reiterated the views expressed on the record by parties filing initial comments.

[46] Tennessee LECs' Reply Comments at 2-3, citing the Bureau's December 2, 1988 letter. The Tennessee LECs also filed "Supplemental Reply Comments" purportedly responding to the comments of the MoPSC filed January 8, 1990. Those reply comments, however, respond to issues that MoPSC did not raise, contrary to Section 1.45(b) of the rules. Accordingly, we will not entertain the Tennessee LECs' "Supplemental Reply Comments".

[47] *See supra* ¶ 6.

[48] New Part 36 Joint Board Decision, 2 FCC Rcd at 2582.

[49] "Average schedule companies" are defined by rule as telephone companies that were receiving average schedule settlements on December 1, 1982. *See* 47 C.F.R. §69.605(c).

[50] MTS and WATS Market Structure: Average Schedule Companies, *Report and Order*, 103 FCC 2d 1017, 1018-19 (1986) (*Average Schedule Order*), *recon. den. in part*, 3 FCC Rcd 834 (1986) (*Average Schedule Recon. Order*), *further recon. den.*, 2 FCC Rcd 6642 (1987) (*Average Schedule Further Recon. Order*), *remanded sub nom.* City of Brookings Municipal Telephone Company et al v. FCC, 822 F.2d 1153 (1987), *remanded sub nom. Alltel, supra, mod. on remand*, 4 FCC Rcd 2218 (1989).

[51] *See e.g., Access Charge Recon. Order*, 97 FCC 2d at 760; *Average Schedule Recon. Order*, 3 FCC Rcd at 834; Revisions to the Average Schedules Proposed by NECA on October 3, 1988, *Memorandum Opinion and Order*, 4 FCC Rcd 2804 (1989) (*1989 NECA Revision Order*).

[52] 47 C.F.R. §69.606(a).

[53] Whereas the Commission has never prescribed Part 36 as a separations methodology for average schedule companies, Mid-Plains's reliance on *Hawaiian Tel.* is not appropriate. The court there held that when the Commission has prescribed separations procedures, the states are bound by the Commission's cost allocation procedures and therefore are not permitted to set different allocations simply because they disagree with the Commission's separations methodology. Because we have not prescribed Part 36 as the separations methodology for average schedule companies, *Hawaiian Tel.* cannot support Mid-Plains's petition.

[54] Amendment of Part 69 of the Commission's Rules and Regulations; Access Charges, to Conform it with Part 36 Jurisdictional Separations Procedures, *Notice of Proposed Rulemaking*, 2 FCC Rcd 2673 (1987), *Report and Order*, 2 FCC Rcd 6447 (1987), *recon.*, 4 FCC Rcd 765 (1989).

[55] *Average Schedule Further Recon. Order*, 2 FCC Rcd at 6644, n.3. *See also, Average Schedule Order*, 103 FCC 2d at 1026, n.47.

[56] *See NARUC, supra; Alltel, supra.*

[57] *Alltel*, 838 F.2d at 558 (stating that the affiliate rule does not explain how an average schedule company is less burdened by conversion to cost studies if it is affiliated with other cost study companies). *NARUC*, 737 F.2d at 1128.

[58] *Average Schedule Order*, 103 FCC 2d at 1028, *citing* AT&T's Comments at 12 (filed April 29, 1985).

[59] *Id.* at 563.

[60] *Alltel*, 838 F.2d at 561. Moreover, the court, in a footnote, implied that it found those petitioners' residual ratemaking argument persuasive: "[t]he FCC's argument requires us to assume that lower interstate returns will not lead to higher intrastate revenues [*i.e.*, residual ratemaking would not prevent recovery of any windfalls from using averages schedules]. Otherwise, a crucial part of the FCC's abuse argument disappears: there would be no profit to attract the manipulating carrier." *Id.*

[61] *Average Schedule Order*, 103 FCC 2d at 1027.

[62] Since the Commission has not prescribed any jurisdictional separations method for average schedule companies, Section 410(c)'s provision regarding establishment of a Joint Board to address separations matters is not applicable. Similarly, since no conflict exists here between Part 36 and state separations methodologies, Mid-Plains's argument regarding inconsistency with price caps is also unavailing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RATES TECHNOLOGY, INC.
Complainant,

v. File No. E-88-40

AT&T COMMUNICATIONS,
Defendant.

ORDER

Adopted: November 16, 1990; Released: November 27, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a motion filed on November 14, 1990, by the complainant in the above-captioned proceeding, Rates Technology, Inc. (Rates), requesting that we dismiss the complaint without prejudice. We have fully considered Rates' unopposed motion and grant the requested relief.

2. Accordingly, IT IS ORDERED, pursuant to the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R.§ 0.291, that the above-captioned complaint IS DISMISSED without prejudice and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PROGRESSIVE COMMUNICATIONS, INC. Temple, Texas	**MM Docket No. 84-352** File No. BPH-820512AP
Mary McFaddin Pyle, d/b/a MARYMC BROADCASTING CO. Temple, Texas	**MM Docket No. 84-354** File No. BPH-820524BB
BELL COUNTY BROADCASTING COMPANY Temple, Texas	**MM Docket No. 84-355** File No. BPH-820524BJ

For Construction Permit for
a New FM Station

ORDER

Adopted: November 13, 1990; Released: November 27, 1990

By the Commission:

1. By this Order, we deny review of and affirm a Review Board decision, *Progressive Communications, Inc.*, 3 FCC Rcd 5758 (1988), granting the above-captioned application filed by Progressive Communications, Inc.[1]

2. In the instant proceeding, Bell sought full integration credit for the day-to-day participation of its sole voting shareholders, Teresa Watts and Judy Morales Steinheimer, in the operation of its proposed station. The Review Board, however, found that Bell's integration proposal was entitled to no comparative credit. 3 FCC Rcd at 5760-62 ¶¶ 15-22. For the reasons that follow, we agree.

3. Teresa Watts and William Watts (husband and wife) initially structured Bell's application so that she would have a 51 percent ownership interest and be in control of the applicant, whereas William Watts would have a 49 percent ownership interest and be president and general manager of the station. In so doing, the Watts believed that Bell's comparative posture would be enhanced as a result of Teresa Watts' female status. Nevertheless, and in contradiction with this formal ownership structure, both believed it would be advantageous to Bell to hold out to the community that the station would be controlled by a male, William Watts. Tr. 700-01. Thereafter, William Watts conveyed his ownership interest to Teresa Watts and Steinheimer on the B cut-off date so as to further improve Bell's comparative position in the proceeding.[2] Bell Remand Ex. 1, p. 4.

4. The record evidence further reveals, however, that although William Watts formally withdrew as an owner of Bell, he continued to be active in Bell's affairs as an interested party. For instance, he attended settlement discussions between Bell and MaryMc (Tr. 730-32); he discussed the securing of a new antenna site with Teresa Watts (Tr. 728); he discussed the need to file exceptions to the initial decision in this case (Tr. 729); he paid bills for Bell with checks from his and his wife's joint account (Tr. 758); and he agreed to advise and assist Teresa Watts in the operation of the station should the Bell application be granted (Tr. 740). The record also reveals that both his wife and Steinheimer viewed William Watts as a interested party in the applicant even after the transfer of his ownership interest. For instance, he assisted his wife in recruiting Steinheimer as a Bell principal, and he attended meetings that Steinheimer had with Teresa Watts (Tr. 809). Moreover, Steinheimer reviewed Bell's progress with William Watts (Tr. 806); she consulted with him about securing a new antenna site (Tr. 808); and she gave summaries of her conversations with both Teresa Watts and William Watts to Bell's attorney (Tr. 807).

5. Recently, in *Royce International Broadcasting*, 5 FCC Rcd (1990), we articulated the standards under which we credit integration proposals. These standards insure that applicants, which have submitted integration proposals that fully identify the interests of all principals and reliably establish that they will fulfill their integration commitments, receive credit for their integrated ownership interests. Applicants that cannot satisfy these standards, however, receive reduced credit or, in extreme cases, no credit, even though some of their owners propose to be integrated into the day-to-day operation and management of the station. In *Royce International Broadcasting*, we said that we have no basis for awarding any integration credit at all "where the applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure.. . ." 5 FCC Rcd at ¶ 10. We further stated that we would completely discount an integration proposal where "(1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs [, or] (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant. . . ." 5 FCC Rcd at ¶ 10, citing *Metroplex Communications, Inc.*, 5 FCC Rcd (1990); and *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985).

6. Applying *Royce International Broadcasting* to the facts of this case, we affirm the Board's refusal to credit Bell's integration proposal. We conclude that William Watts' undisclosed, continuing interest in the application, as revealed by the record, indicates that Bell has not reliably established the extent to which its specified owners will be in a position to exercise control over the applicant. Thus, Bell's specified ownership and integration proposal is fundamentally uncertain. As recounted above, see paragraph 3, although Bell's ownership initially accorded Teresa Watts control of the applicant to gain credit for female ownership, the Watts nonetheless intended that William Watts would be the head of the company so that it would appear to the community that a man controlled the applicant. William Watts continued to be significantly involved in the affairs of Bell as an interested party long

after the transfer of his ownership interest to his wife and Steinheimer. Bell's integration proposal depicted William Watts as severing all ties with the applicant upon the transfer of his ownership interest, however, contrary to substantial record evidence.

7. Although Teresa Watts and Steinheimer may have ownership interests and may participate to some extent in the day-to-day operation of the proposed station, the evidence reveals that Teresa Watts, Steinheimer and William Watts all considered William Watts as part of the team and expected him to be an important part of the venture, as an individual who exercised substantial control over the applicant and who can be expected to continue to do so should Bell's application be granted. Thus, Bell's integration proposal cannot be relied on to depict accurately the respective roles of all parties in interest in the proposed operation of the station. Nor do we believe the record warrants a finding of even partial integration, because we are unable, under the circumstances, to determine the extent to which Teresa Watts and Steinheimer will exercise control over the applicant. There is therefore "no basis for awarding even partial credit [for Bell's proposed integration] because the control of the applicant . . . cannot be reliably ascertained" from Bell's integration proposal. *Royce International Broadcasting*, 5 Rcd at ¶ 10.

8. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed November 1, 1988 by MaryMc Broadcasting Co. and November 16, 1988 by Bell County Broadcasting Company ARE DENIED.

9. IT IS FURTHER ORDERED, That the Motion for Immediate Issuance of an Order Deleting Issues, filed August 21, 1989 by Bell County Broadcasting Company IS DISMISSED as moot. [3]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission are Applications for Review filed November 1, 1988 by MaryMc Broadcasting Co. and November 10, 1988 by Bell County Broadcasting Company; Oppositions filed November 16 and 21, 1988 by Progressive; a Motion for Immediate Issuance of an Order Deleting Issues filed August 21, 1989 by Bell; an Opposition filed August 24, 1989 by MaryMc; and a Reply filed September 14, 1989 by Bell.

[2] Applicants' ownership interests are frozen on the B cut-off date and cannot thereafter be improved for comparative credit.

[3] Bell asks for the deletion of financial certification and financial qualification issues which were specified against it. The Board did not rely on the evidence adduced under those issues in denying Bell's application. *Progressive Communications, Inc.*, 3 FCC Rcd at 5766 ¶ 22. Nor have we placed any reliance on that evidence in affirming the Board's decision. Hence, those issues and/or the evidence compiled thereunder is without decisional significance in the resolution of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license - USCG/FAA petition for reconsideration

MEMORANDUM, OPINION AND ORDER

Adopted: November 5, 1990; Released: November 27, 1990

By the Commission:

1. By this action the Commission denies the Joint Petition for Partial Reconsideration and Further Rule Making, filed on May 24, 1989, by the United States Coast Guard (USCG) and the Federal Aviation Administration (FAA). The petitioners are concerned that non-licensed Power Line Carrier (PLC) systems operating under Part 15 of the Commission's rules have the potential to cause interference to LORAN-C radionavigation operations. They have requested that the Commission reconsider in part its decision in the *First Report and Order* [1] in this proceeding with respect to the establishment of field strength limits for radiated emissions from PLC systems operating in the 75-125 kHz band.

BACKGROUND

2. LORAN-C is a radionavigation system operating at 100 kHz that was originally developed for maritime use. A LORAN-C receiver compares signals from several fixed transmitters and determines the user's location. Advancements in technology have recently led to LORAN-C use for aeronautical radionavigation and terrestrial vehicle tracking. These applications have generally been limited to the Great Lakes and coastal regions due to the location of the original LORAN-C transmitter chains. Congress has approved a "mid-continental" chain of transmitters to be constructed by the USCG with expected completion by 1992. This will greatly extend the coverage area for LORAN-C and hence increase the number of potential LORAN-C users.

3. PLC systems operate by sending radio frequency energy over electric power transmission lines. They are used by electric power utilities for communications purposes such as protective relaying, telemetry, and other general supervision of the power system. PLCs are permitted, under Section 15.113 of the FCC Rules, to operate within the frequency range of 10-490 kHz without a limit on the level of the radiated emissions that leak from the power lines. As with other Part 15 devices, PLCs operate on a non-licensed basis under the condition that they cause no interference to other authorized radio services.[2]

4. In the *Notice of Proposed Rule Making* in this proceeding, the Commission proposed no changes concerning PLCs. [3] However, in comments responding to the *Notice of Proposed Rule Making*, the USCG requested that the Commission adopt field strength limits for PLCs that operate in the 75-125 kHz band, stating that such limits are needed to avoid the potential of harmful interference to LORAN-C receivers. In addition, the USCG requested that data concerning the operating parameters of PLCs be made public to facilitate the location of LORAN-C interference sources.

5. The Utilities Telecommunications Council (UTC) filed reply comments objecting to USCG's proposals. It noted the difficulty and expense involved in measuring every PLC transmission in order to conform to the proposed emission limits. It also pointed out that PLCs operate under the condition that interference not be caused to other radio operations. UTC indicated that, if necessary, PLC users would vacate the frequencies or take other steps to correct interference problems. UTC asserted that public release of data regarding PLC operations would expose electric utilities to security risks and noted that an agreement to make the necessary information available to authorized entities was being developed.

6. A Memorandum of Understanding (MOU) was negotiated between the Commission, NTIA, UTC and the North American Electric Reliability Council (NERC) and signed on December 13, 1988. This agreement was established to meet the Commission's notification requirements as specified in Section 90.63(g) of the FCC rules.[4] Under this section, utilities operating PLC systems in the 10-490 kHz band are required to report the technical and operational characteristics of the system to an industry-operated entity designated by the FCC and the National Telecommunications and Information Agency (NTIA). This notification requirement was adopted in an earlier proceeding to provide a record of PLCs operating in the 10-490 kHz band.[5] NERC, the designated industry-operated entity that receives the notifications, maintains a data base containing PLC parameters. This data is then made available to users of the 10-490 kHz frequency band to assist in resolving interference problems.

7. In the *First Report and Order*, the Commission agreed with UTC that it would be extremely burdensome to require that utilities measure all power lines used for PLC operation when only those power lines located in close proximity to the areas where LORAN-C signals are used by vehicles and aircraft could pose any harmful interference problems. The Commission also determined that the PLC information necessary to resolve interference problems would be made available through the MOU. Accordingly, the Commission denied the USCG's request to impose emission limits and to make PLC data public.[6]

SUMMARY OF PETITION AND COMMENTS

8. The USCG/FAA petition requests that the Commission: 1) reconsider its decision and, at the minimum, adopt as "interim guidelines" the field strength limits previously proposed by USCG; and, 2) initiate a Further Notice of Proposed Rule Making to address mandatory field strength limits for PLC systems operating in the 75-125 kHz band. Petitioners contend that testing of all

power lines used for PLC transmissions would not be necessary. Instead, computer modeling programs, such as the Numerical Electromagnetics Code (NEC), could be used to predict whether a PLC system would conform to any limits imposed.[7]

9. The petitioners note that, according to NERC data, approximately 84 percent of PLC transmitters operating between 75 kHz and 125 kHz transmit short-term, narrow pulsed signals. They state that the Interdepartment Radio Advisory Committee (IRAC) has requested the Department of Transportation to conduct tests to determine the impact of short-term PLC signals on LORAN-C receivers. Results of these tests are expected later this year. The petitioners conclude that, should the results indicate that LORAN-C receivers can tolerate short-term PLC signals, the number of PLC systems required to comply with the proposed emission limits would be substantially reduced.

10. The USCG/FAA petition includes a report prepared by the National Telecommunications and Information Administration (NTIA), of the U.S. Department of Commerce, that presents an analysis of the interference potential from PLC systems to LORAN-C receivers.[8] This report recommends that field strength limits be established for PLCs. In order to determine appropriate field strength limits, the report recommends that the FAA develop LORAN-C operation performance criteria.[9] Consistent with the petition, the NTIA report recommends testing the impact of short-term PLC transmissions on LORAN-C receivers and suggests that if short-term PLC signals can be tolerated by LORAN-C receivers, the majority of PLC equipment operating in the 90-110 kHz band may be able to continue operating on these frequencies.[10]

11. The UTC filed an opposition to the USCG/FAA petition stating that no new evidence of PLC interference to LORAN-C radionavigation equipment has been presented that would merit reconsideration of this matter. It notes that the PLC MOU was fully executed in January of 1989, and was designed specifically for avoiding any interference problem to LORAN-C reception from PLCs. UTC states that this MOU, which was added since this proceeding began, provides an additional safeguard against interference. It also contends that using the NEC program to predict potential interference problems will be too burdensome for utilities to use, citing the NTIA report which states that the time to learn and run the program would make it unfeasible to use on a case-by-case basis.[11]

12. The Radio Technical Commission for Maritime Services, The Wild Goose Association, and II Morrow, Inc. filed comments in support of the USCG/FAA petition. Reply comments were filed by the USCG and II Morrow, Inc. In its reply comments, USCG suggests that using the NEC program to predict interference would not be too burdensome because the results of modeling one power line should be applicable to most similar power line configurations.

DISCUSSION

13. The USCG/FAA petition for reconsideration provides insufficient evidence to convince us that field strength limits to protect LORAN-C signals from interference by Part 15 PLC operations are warranted at this time. The petitioners have not demonstrated that PLC operations pose serious interference problems for the LORAN-C service or that the procedures already in place for resolving interference by PLC operations to LORAN-C do not provide an adequate regulatory safeguard. The interference resolution system established by the MOU, coupled with the longstanding regulation prohibiting PLCs from causing harmful interference and requiring PLCs to cease operation immediately if harmful interference occurs, seems to be successful in eliminating such interference problems. Moreover, at this point in time, we have very little information about the situations and conditions under which interference to LORAN-C reception by PLC operations is likely to occur. The NTIA report recommends that the FAA develop LORAN-C operation performance criteria. Such criteria, along with the results of the testing of short-term PLC transmissions and other concrete information regarding the occurrence of interference, would be necessary to develop appropriate field strength limits. While we recognize that LORAN-C use will be increasing on and over the land areas of the United States, it is not yet clear whether the mid-continental chain of LORAN-C transmitters will make interference problems more common by attracting more LORAN-C users or eliminate potential interference problems by providing better LORAN-C coverage. In view of the above, we believe that it would be premature to adopt or propose field strength limits for PLC systems operating on the 75-125 kHz band. We recognize, however, that the Department of Transportation is expected to complete a study on this issue late this year. We look forward to receiving the results of that study. Should that study, or any other information we receive, provide evidence that interference to LORAN-C reception by PLC operations is more serious than is presently indicated, or that our existing safeguards are inadequate, we will of course take appropriate action.

14. Accordingly, pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's rules, IT IS ORDERED that the Joint Petition for Reconsideration and Further Rule Making filed by the United States Coast Guard and the Federal Aviation Administration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).

[2] *See* 47 CFR Section 15.5.

[3] *See Notice of Proposed Rule Making* in GEN Docket No. 87-389, 2 FCC Rcd 6135 (1987).

[4] *See* 47 CFR 90.63(g).

[5] *See Report and Order*, GEN Docket No. 82-9, 48 FR 5922 (1983).

[6] *See First Report and Order*, GEN Docket No. 87-389, *supra*, at para. 89.

[7] The NEC computer modeling program can predict the level of electromagnetic fields generated by certain radio frequency sources, such as PLCs, based on various parameters including

tower height and spacing, power input, and transmission line configuration. *See*Numerical Electromagnetics Code-Method of Moments, G.J. Burke and A.J. Poggio, Naval Ocean Systems Center, Technical Document 116, January 1981.

[8] *See*U.S. Department of Commerce, National Telecommunications and Information Administration, Report No. NTIA TM-88-133, "Assessment of Potential Interference from Power-Line-Carrier Systems to LORAN-C Aeronautical Receivers," September, 1988.

[9] *Id.*at page 2-3.

[10] *Id.*

[11] *See*"Opposition of the Utilities Telecommunications Council to Joint Petition for Reconsideration", June 30, 1989, at para. 20; *and,*NTIA Report No. NTIA TM-88-133, *supra,*Appendix "C, at pg. C-2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-28

In re Applications of

EDWARD ROYCE STOLTZ, II, tr/as ROYCE INTERNATIONAL BROADCASTING
Station KWOD-FM
Sacramento, California
File No. BRH-830719BD

For Renewal of License

WONG COMMUNICATIONS LIMITED PARTNERSHIP
Sacramento, California
File No. BPH-831031AY

For Construction Permit for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1990; Released: November 27, 1990

By the Commission:

1. The Commission has before it a decision of the Review Board granting Royce International Broadcasting's application for renewal of KWOD-FM in Sacramento, California, and denying Wong Communications Limited Partnership's mutually exclusive application for a construction permit. *Royce International Broadcasting*, 4 FCC Rcd 7139 (Rev. Bd. 1989).[1]

2. We agree with the Board's resolution of this case. We take this opportunity to restate our concerns about a recurring problem illustrated by Wong's competing application -- that of unreliable integration proposals. As the Board noted, Wong is organized as a limited partnership, with Fay Gum Wong holding a 60 percent interest as a general partner and her brother Kin Shaw Wong, holding a 40 percent interest as a limited partner. 4 FCC Rcd at 1377 ¶ 141. Wong indicates that Ms. Wong will serve as general manager of the proposed station and claims entitlement to 100 percent integration credit. *Id.* at 1377 ¶ 146. We fully agree with the Board on the facts presented that Wong is entitled to no integration credit. Despite Wong's status as a limited partnership,[2] the Wongs have consistently ignored organizational formalities and Mr. Wong continued not only to participate actively in partnership affairs contrary to his purported status as a limited partner, [3] but dominated its activities. *See* 4 FCC Rcd at 1377-84 ¶¶ 140-238, 1387 ¶ 256, 7144-46 ¶¶ 29-38.

3. In view of the foregoing, the record evidence shows that Mr. Wong, the purported limited partner, clearly has been and will likely remain the dominant principal in Wong. Moreover, Ms. Wong's essentially passive role undermines the reliability of her claim that she will wield management authority. Wong has therefore failed to meet its burden of demonstrating that its proposals are bona fide and entitled to any integration credit. *See KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985).

4. Our review of this case prompts us to address the problem of defective integration proposals more generally.[4] Because of the substantial, often decisive, weight accorded to integrated applicants under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), applicants routinely challenge the soundness and reliability of their competitors' integration proposals on a variety of grounds. As this case illustrates, these challenges frequently occur in cases involving applications held by limited partnerships (like Wong) and other two-tiered organizations (for example, corporations with voting and non-voting stock).[5]

5. The opponents of such two-tiered applicants often challenge the applicant's characterization of its principal's ownership interests -- especially the distinction made between "active" and "passive" owners. When these challenges are well- founded, the applicant's integration credit has been reduced. *See, e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1259 (1987). In some cases, like the Wong proposal, questions about the allocation of control as between integrated and nonintegrated owners have led to the denial of integration credit altogether. *Cf. KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985) (which did not, however, involve a two-tiered organization).

6. Although we have encountered several cases of this type in the past, we believe the time has come for us to set out a more comprehensive statement of the principles governing their disposition. Additionally, our examination of these underlying principles leads us to conclusions about how defective integration proposals should be dealt with that may be somewhat stricter than the approach that has been taken in some past cases. We believe that the approach set forth here is reasonable and necessary in light of the general principles involved.

7. It is axiomatic that integration credit is due only when "the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 ¶ 8 (1990). *See also Bradley Hand & Triplett*, 89 FCC 2d 657, 662-63 ¶ 8 (Rev. Bd. 1982). This principle has frequently been invoked to disallow integration credit when, for example, a principal's outside employment activities cast substantial doubt on whether the proposed integration into station management is likely to be effectuated. *See Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1241-42 ¶¶ 8-11 (Rev. Bd. 1987); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 ¶¶ 16-18 (Rev. Bd. 1978). When an integration pledge has been rejected for this reason, we have ordinarily reduced the applicant's integration credit in proportion to the equity held by the principal whose proposal was not reliably established.

8. We believe that this principle -- which requires applicants to establish the overall reliability of their integration proposals to obtain comparative credit -- necessarily

applies to subsidiary questions like whether the applicant's described ownership structure accurately reflects the manner in which control will be exercised. To the extent an applicant's conduct or intentions are demonstrably at odds with its described ownership structure, the applicant has unquestionably failed to meet its burden of showing that its proposal is reliable.[6] As we explain in the following paragraphs, we cannot, in those circumstances, take at face value the applicant's claim that the Commission should award credit for the integration of the applicant's active owners, while ignoring the nonintegration of its passive owners in calculating the applicant's integration credit.

9. Some cases raise the question of whether one or more of the applicants' nominally passive principals[7] will, together with the nominally active principals, exercise control over the applicant despite the applicant's formal designation of these individuals as passive and active, respectively. Where one or more of an applicant's purportedly passive owners actively participates in prosecuting the application after the applicant has formally organized itself as a limited partnership or two-tiered corporation, the applicant has undermined our confidence that it will observe the active-passive distinction in the future. *See Coast TV*, 5 FCC Rcd at 2752-53 ¶¶ 8-10, 16 (1990). The distinction is especially suspect where the general partners (or voting stockholders) -- who purportedly hold exclusive control -- knew or reasonably should have known of the passive owner's actions and took no corrective action. In these latter circumstances, we have no assurance that the applicant will comport itself with its organizational structure in the future and, thus, that its two-tiered arrangement is reliable. Viewed from this perspective, we believe that it is necessary in these situations to disregard the purportedly passive status of all of an applicant's owners so denominated. Therefore, where an applicant breaches this standard (or where an applicant otherwise significantly disregards partnership or corporate formalities in conducting its affairs[8]), we will attribute all passive interests in calculating integration credit. The nonintegration of these attributed passive interests will, of course, detract from the total credit due the applicant.[9] *See Coast TV*, 5 FCC Rcd at 2753 ¶ 17 (limited partners actively participated in partnership affairs); *Signal Ministries, Inc.*, 104 FCC 2d at 1495 ¶ 15 (where both voting and nonvoting stockholders participated equally in the corporation's decisionmaking despite the formal difference in their status).

10. Other cases -- like this one -- raise more far-reaching questions about where control of an applicant lies (that is, beyond the question of whether the applicant will observe the distinction between active and passive owners). In these cases, the nominally active principals might not, in fact, be exercising control over the applicant at all, and the applicant should not receive any credit for the claimed integration of such individuals. As in this case, where the applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure, we have no basis for awarding any integration credit at all. The ownership and control of the applicant may be shown to be fatally uncertain because: (1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs;[10] (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant; or (3) the assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so. Such situations provide no basis for awarding even partial credit because the control of the applicant as between integrated and nonintegrated principals cannot be reliably ascertained, and, thus, we will discount such proposals completely.[11] *See* cases cited note 10, above.[12]

11. Applying the foregoing principles to this case, the record, as detailed by the ALJ and the Board, indicates that Kin Shaw Wong, Wong's purported limited partner, has conspicuously dominated the applicant's affairs despite his disclaimers to the contrary.[13] *See* 4 FCC Rcd at 1377-84 ¶ 140-238, 1387 ¶ 256, 7144-46 ¶ 29-38. In addition, Fay Wong, the purported general partner, has been little more than the instrument of her brother's strategic plan for the Sacramento broadcast market. Even she concedes that, contrary to the organizational structure of the applicant, she will look to Kin Wong for guidance in operating the proposed station, and her station would be operated jointly with Kin's existing AM radio station. For all these reasons Wong's proposal is fundamentally unreliable. The Board therefore had an ample basis to deny all integration credit to Wong.[14]

12. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed November 8, 1989 by Wong Communications Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are pending: (1) an Application for Review filed November 8, 1989 by Wong Communications Limited Partnership; and (2) oppositions filed December 11, 1989 by Royce International Broadcasting and the Mass Media Bureau.

[2] Wong filed its limited partnership agreement with the State of California on October 31, 1983, the same day it filed its application.

[3] *See Coast TV*, 5 FCC Rcd 2751 (1990) (activities by purportedly passive principals inconsistent with partnership agreement warrant, at a minimum, attribution of their ownership interests and may result in disallowance of integration credit altogether if the proposal is not bona fide).

[4] Nothing in this re-evaluation, however, changes the result in this case.

[5] By using these organizational vehicles, applicants can enhance their comparative standing by proposing to integrate most or all "active" principals and to insulate all others from their applicant's activities. The interests of passive principals are not attributed and, thus, are not counted in computing integration credit. *See Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981).

[6] In some particularly egregious cases, the record may indicate that an applicant's integration proposal is not only unreliable but contains false statements amounting to disqualifying misrepresentations. *See Mid - Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *recon. denied*, 5 FCC Rcd 4597 (1990). When necessary to resolve the case, an appropriate issue will be added and the matter further considered.

[7] These include limited partners and nonvoting stockholders.

[8] Examples of this might include failing to keep the applicant's financial affairs separate from those of its principals and failing to act in accordance with the applicant's partnership agreement or bylaws.

[9] As an example, an applicant might consist of two (integrated) general partners and three (nonintegrated) limited partners, each holding an equal interest. Attribution of the limited partners' interests would reduce the applicant's integration credit from 100 percent to 40 percent.

[10] For example, the applicant may have been formed in a manner that is irreconcilable with the exercise of sound business judgment. That is, it may appear that the individuals organizing the applicant are giving away control or ownership in a manner that is patently unreasonable if taken at face value. *See Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990). *Cf. KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985) (where it appeared unbelievable, under the circumstances, that an investor would give away control of the broadcast applicant to an individual who would make no investment). Additionally, the scope of participation by passive principals in the applicant's affairs after formation may suggest their *de facto* dominant status (*i.e.*, like the actions of Kin Shaw Wong in this case).

[11] Thus, again using the hypothetical applicant in footnote 9 as an example, if there were fatal uncertainties concerning the true interest of the two nominal general partners, the applicant would not be credited with their integration. The applicant's claimed integration credit would be reduced from 100 percent to zero percent.

[12] Obviously, these determinations should not be lightly made; however, the burden of demonstrating the reliability of its proposal remains squarely on the applicant, and, where it has failed to meet that burden, we will not hesitate to discredit its proposal.

[13] In *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission reaffirmed the principle set forth in *KIST Corp.*, 102 FCC 2d 288 (1985), that it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is bona fide. *Id.* at n.4. *Coast* also limits *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), which by implication discounted the significance of the pre- and post-organizational activities of an applicant's principals in determining whether an applicant's ownership structure should be credited. *Compare Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), in which neither the passive owner's post- organizational conduct nor the totality of the circumstances was otherwise inconsistent with the applicant's stated ownership structure.

[14] Our disposition of this case should not be construed as giving any indication of what determination will be made with respect to the questions concerning the " *Anax* " Doctrine raised in our recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*,5 FCC Rcd 4050 (1990). Irrespective of how that issue is ultimately resolved, the duty of applicants to show the credibility of their proposals is fundamental to our comparative analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-432

In re Applications of

WELCH COMMUNICATIONS, INC.	File No. BPH-870827MY
SWAN CREEK COMMUNICATIONS	File No. BPH-870827NJ

For Construction Permit for
New FM Station, Channel 297A,
Swanton, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 1990; Released: November 30, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

Board Member BLUMENTHAL issuing Statement.

1. The Review Board has before it for consideration an appeal filed pursuant to 47 CFR §1.301(a)(2) on October 19, 1990 by Welch Communications, Inc. (Welch) from a ruling of Administrative Law Judge Walter C. Miller (ALJ) ordering that certain documents be produced over a claim of attorney-client privilege. Welch's pleading is accompanied by a motion to stay the proceeding pending resolution of the appeal. Also before the Board is a petition for extraordinary relief filed by Welch on October 22, 1990 in which it seeks reversal of the ALJ's ruling adding hearing issues against it. Swan Creek Communications (Swan Creek) filed oppositions to Welch's pleadings on October 25 and October 26, 1990. For the reasons that follow, we will dismiss the appeal and return the matter to the ALJ for further consideration of the underlying privilege claim, and will deny the extraordinary relief request.[1]

BACKGROUND

2. Upon review of the exceptions to the *Initial Decision*, 5 FCC Rcd 2927 (1990), in this proceeding, the Board remanded the case for additional hearing to determine whether the winner below, Swan Creek, was financially qualified and whether it misrepresented its financial qualifications to the Commission. *Memorandum Opinion and Order*, 5 FCC Rcd 4850 (Rev. Bd. 1990). Subsequent to our remand, the ALJ, in a *Further Prehearing Order*, FCC 90M-2764, released September 4, 1990, added identical issues against Welch because "the record demonstrates that the concerns [the Board had] with Swan Creek's application, *supra*, apply *a fortiori* to Welch" and that "[s]tated another way, . . . Swan Creek's competitor faces the same financial problems that Swan Creek does, although under a different factual context." *Id.*, at p.2. The ALJ also added a further issue against Welch to determine whether it abused the Commission's processes by presenting an amendment in contravention of the *Hearing Designation Order*. *Id.*

3. Thereafter, by *Memorandum Opinion and Order*, FCC 90M-3056, released September 27, 1990, the ALJ granted in part Swan Creek's motion for production of documents and ruled that certain documents which he previously held were privileged (*see Memorandum Opinion and Order*, FCC 88M-4319, released December 18, 1988), must now be made available for inspection. The ALJ stated:

> [T]he Trial Judge has previously held that the attorney-client privilege attached to those documents. But that was before financial qualifications, false financial certification, and abuse of process issues were added against Welch. *See* FCC 90M-2764, *supra*, at paras. 2-3. With the adding of those issues, the need for disclosure now outweighs the right to exercise the privilege. And since the documents in Category 10 are reasonably calculated to lead to the adduction of admissible evidence, Welch must make them available.

FCC 90M-3056, *supra*, at p. 2. Welch's appeal and request for extraordinary relief ensued.

APPEAL

4. In its appeal from the ALJ's discovery order, Welch argues that the ALJ's reversal of his prior ruling that the subject documents (four in number) were protected from disclosure by the attorney-client privilege is not supported by reasoned analysis or reference to governing precedent. In fact, Welch submits, the ALJ's determination is counter to cases holding that the privilege cannot be defeated by a countervailing demonstration of substantial need, citing *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); and *RKO General, Inc.*, 97 FCC 2d 423 (1984). In opposition to Welch's appeal, Swan Creek argues that the ALJ's reconsideration of his earlier ruling that the documents are subject to the attorney-client privilege is correct because of their relevance to the enlarged issues. Even if the documents are subject to the privilege, Swan Creek maintains, the privilege is, in turn, subject to the principles of exception and implied waiver, and that the former is applicable in this case, citing *Clark v. U. S.*, 289 U.S. 1 (1933); *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982); and *Welch Communications, Inc.*, 4 FCC Rcd 3979 (Rev. Bd. 1989).

5. We will dismiss Welch's appeal and remand the privilege claim to the ALJ for further consideration. The Commission has recently explained that, "The attorney-client privilege protects confidential communications by a client to his lawyer for the purpose of obtaining legal advice." *Georgia Public Telecommunications Commission*, 5 FCC Rcd 4560 (1990); *accord WWOR - TV, Inc.*, FCC 90-345, released October 18, 1990, para. 11. As correctly observed by Swan Creek, however, the privilege is, in some circumstances, limited by the doctrine of "exception", which has been defined as follows: "Exception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *Sealed Case*, *supra*, 676 F.2d at 807.

6. Here, the ALJ examined *in camera* the subject documents (which consist of four communications between attorney J. Richard Carr and his client Charles Welch) and originally ruled that they were absolutely privileged. *See* FCC 88M-4319, *supra*. In defense of the ALJ's reversal ordering full disclosure, Swan Creek argues that the ALJ's *volte face* was premised on the "exception" doctrine, but we can find no basis in the language of the ALJ's latest ruling to support this interpretation. Rather, the ALJ simply relied on his addition of new hearing issues to justify production. This was error. That the documents may be relevant to the new issues does not mean that they cannot also be privileged. *See RKO General, Inc., supra*, 97 FCC 2d at 426-427 (The general rule that all documents that are relevant and reasonably calculated to lead to the discovery of admissible evidence must be produced is subject to the attorney-client privilege exclusion.) Nevertheless, it does not appear that the parties specifically addressed the limiting doctrine of "exception" before the ALJ prior to his disclosure ruling, even though Swan Creek now creatively relies upon it. Therefore, we believe the best course, *ab initio*, would be to return the privilege claim to the ALJ so that he can reconsider his ruling after he affords the parties an opportunity to fully brief the legal issue of the applicability *vel non* of the doctrine of "exception" to the documents at issue. Likewise, any future appeal to the Board must be supported by full ventilation of this important legal point. *See generally Upjohn Co. v. United States*, 449 U.S. 383, 389-390 (1981) (purpose of attorney-client privilege explained); *Clark v. U.S., supra*.

PETITION FOR EXTRAORDINARY RELIEF

7. In support of its petition for extraordinary relief, Welch argues that the ALJ's addition of hearing issues against it constituted egregious error. Specifically, it asserts that the ALJ's authority to add hearing issues is not unlimited, and submits that the ALJ's action went beyond the scope of his authority because the Board's remand was restricted to the issues added against Swan Creek. In opposition, Swan Creek contends that Welch's motion is unauthorized because the ALJ denied Welch's petition for leave to file an appeal by *Memorandum Opinion and Order*, FCC 90M-2956, released September 18, 1990. On the merits, Swan Creek argues that the ALJ acted well within his jurisdiction in adding the contested issues because the record below established that Welch's financial proposal was a sham.[2]

8. We will deny Welch's request for extraordinary relief. Where, as in this case, permission for leave to appeal an ALJ's interlocutory ruling has been denied pursuant to 47 CFR § 1.301(b), that ruling will be deemed final unless egregious error or flagrant abuse of discretion is shown. *Communications Satellite Corp.*, 32 FCC 2d 533 (1971); *Shawn Phelan*, 5 FCC Rcd 2622 (Rev. Bd. 1990). We have also specifically held that the addition of hearing issues, which is entrusted to the ALJ by the Commission's rules, 47 CFR § 1.243 (k), is not a matter subject to extraordinary appellate intervention. *Id.* ; *Charisma Broadcasting Corp.*, 63 RR 2d 393 (Rev. Bd. 1987); *Jan - Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983). Welch seeks to overcome these obstacles by claiming that the ALJ lacked basic jurisdiction to add the issues in question. We disagree. Once the proceeding was remanded to the ALJ by the Board, he was "not estop [ped] . . . from adding and trying any issue (*e. g.*, finances, rule violations) if substantial and material questions of fact require the ventilation of such concerns. Such is always within the sound discretion of a Commission ALJ." *Mableton Broadcasting Co., Inc.*, FCC 90R-99, released October 30, 1990, para. 40; *see Modesto Broadcast Group*, 5 FCC Rcd 4674, 4675 n. 2 (Rev. Bd. 1990) ("Whenever 'substantial and material questions of fact' are timely raised concerning an applicant's basic qualifications, appropriate issues must be added by the authority having jurisdiction over the proceeding at the time.")

9. ACCORDINGLY, IT IS ORDERED, That the appeal filed October 19, 1990 by Welch Communications Inc. IS DISMISSED, that the petition for extraordinary relief filed by Welch on October 22, 1990 IS DENIED, and that the subject privilege claim IS REMANDED to the ALJ for further consideration in accordance with the foregoing.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] In response to telephonic inquiry of counsel on October 25, 1990, the Board, in effect, granted Welch's stay request to the extent of permitting non-production of only those documents which Welch claimed were privileged. We did so because of the time-sensitive nature of the stay request inasmuch as document production was due the next day and the pleading cycle on Welch's appeal had not yet run. *Cf. Black Television Workshop of Los Angeles, Inc.*, 4 FCC Rcd 2708, 2710 n. 2 (Rev. Bd. 1989). While we recognize that interlocutory rulings appealed under 47 CFR § 1.301 (such as the one before us) are not subject to automatic stay pending completion of proceedings on appeal or review, as are final rulings appealed under 47 CFR § 1.302 (*compare* 47 CFR § 1.301(c) *with* 47 CFR § 1.302(b)), we nevertheless believe that the better practice generally is to stay rulings which, as here, are appealable as a matter of right until the merits can be fully considered.

[2] In *Memorandum Opinion and Order*, FCC 90M-2764, released September 4, 1990, the ALJ, in adding financial issues against Welch, noted that "the Board's remand is incomplete. While the Board wouldn't intentionally send the Trial Judge a piecemeal remand . . . concerns they have with Swan Creek . . . apply . . . to Welch." Shortly thereafter (in another proceeding), the ALJ, in *Memorandum Opinion and Order*, FCC 90M-3023, released September 24, 1990 at n.3, recalled the adding of issues here, stating that he "was convinced Board Member Esbensen . . . had unintentionally failed to add issues" against Welch. We note only that Swan Creek did not raise any exceptions to Welch's financial qualifications.

STATEMENT OF
BOARD MEMBER NORMAN B. BLUMENTHAL
CONCURRING IN PART

I join the majority only insofar as it returns for the ALJ's focused consideration the question of whether the documents ordered to be produced are legally protected

by the attorney-client privilege. Having "previously held that the attorney-client privilege attached to these documents" (*ante*, para. 3), the production order under appeal does not correctly explain why that disposition has changed. The reason stated in the ALJ's production order -- *viz.*, that "the need for disclosure now outweighs the right to exercise the privilege" (*id.*) -- applies to material covered merely by the "work product" doctrine, FRCP, Rule 26(b)(3); neither the order nor the pleadings intimate the relevance of that doctrine.[1] Further, neither the Board nor the Commission has recent experience with the doctrine of "exception" described in *Clark v. U.S.*, 289 U.S. 1 (1933). A thoroughgoing examination of the viscissitudes of that latter doctrine is a mandatory prerequisite to its application at this time.

I do not join fully the majority's treatment of the petition for extraordinary relief. Issues should be added at hearing when there exists on the record a substantial and material issue of fact. Based on Welch's exceptions to the initial decision awarding the permit to a competitor who clearly seemed to admit that it could not fund, simultaneously, the *two* applications it had on file in separate markets, the Board had little choice but to remand. However, *no* exceptions were directed to Welch's own finances, a matter not addressed before the Board. The reason stated by the ALJ for *now* adding, *sua sponte*, a financial issue against Welch -- *viz.*, to establish "a level playing field" between the two applicants -- is, standing alone, insufficient. *See Priscilla L. Schwier*, 4 FCC 2d 2659 (1989) (random financial inquiry at hearing not appropriate), *aff'd per judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256, D.C. Cir., February 7, 1990. Either a substantial and material fact was raised at the initial hearing -- or it was not. No such issue was added against Welch at that initial hearing, and no exceptions saved any objections to Welch's financing. 47 CFR § 1.277(a).[2]

FOOTNOTES TO STATEMENT

[1] To repeat, none of the material before us implies that the documents sought are covered merely by the qualified "work product" doctrine; rather all refer to the "absolute" attorney-client shield. If only the "work product" privilege is here apposite, nobody has so advised the Board.

[2] The ALJ explained that he has now added the Welch financial issue because "he couldn't, in good conscience, stand by and let the Board add issues against one applicant *when the record patently calls for such issues* against another applicant." *Further Prehearing Order*, FCC 90M-2764, at n.3 (emphasis added), released September 4, 1990. To the degree that the ALJ is now rectifying a failure to add a financial issue against Welch on the "patent record" of the prior hearing, he is to be respected for correcting any previous oversight. Indeed, his statement, that "if the evidence taken at the remanded hearing doesn't vary from the evidence already taken" (*id.*) neither applicant likely will be found basically qualified, suggests a forthright recognition of serious oversights affecting *both* applicants. If that is the case, I would salute the ALJ, and would move closer to the majority's position in its instant order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-587

In the Matter of

Amendment of Section 73.202(b), RM-7479
Table of Allotments,
FM Broadcast Stations.
(Tusculum, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Tusculum Regional Broadcasting Company (petitioner) requesting the allotment of Channel 276A to Tusculum, Tennessee, as the community's first local FM broadcast service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 276A to Tusculum, Tennessee, as the community's first local FM service. Petitioner states that Tusculum has a population of 1,242 persons. Tusculum is located in Greene County, which has a population of 54,422 persons.[1] An engineering analysis has determined that Channel 276A can be allotted to Tusculum in compliance with the Commission's minimum distance separation requirements with a site restriction of 8 kilometers (5 miles) east of the community.[2]

3. Accordingly, we believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Tusculum, Tennessee	--	276A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr., Esquire
1359 Black Meadow Road
Spotsylvania, Virginia 22553
(Counsel to Tusculum Regional
Broadcasting Company)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] The coordinates for Channel 276A at Tusculum are North Latitude 36-10-58 and West Longitude 82-40-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-576

In the Matter of

Amendment of Section 73.202(b), RM-7393
Table of Allotments,
FM Broadcast Stations.
(Garrison, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of James P. Gray ("petitioner"), the Commission considers herein a petition for rule making proposing the allotment of Channel 252A to Garrison, Kentucky, as that community's first local broadcast service.

2. An engineering analysis has determined that Channel 252A can be allotted to Garrison in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) east of the community.[1] The site restriction is necessary in order to avoid a short-spacing to Station WKQQ(FM), Channel 251C1, Lexington, Kentucky.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies "among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Garrison is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Garrison is incorporated, or that it has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 3933 (1989); *Sargent, Nebraska*, 4 FCC Rcd 3933, (1989); *Ansley, Alabama*, 46 FR 58688, published December 3, 1981; *Cascade Village, Colorado*, 48 FR 19917, published May 3, 1983; and *Ellwood, California*, 50 FR 13031, published April 2, 1985.

4. We believe the public interest would be served by proposing the allotment of Channel 252A to Garrison, Kentucky, if it is found to be a community for allotment purposes, since it could provide a first local FM service. Accordingly, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Garrison, Kentucky	--	252A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James P. Gray
10 Trinity Place
Fort Thomas, Kentucky 41075

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates are North Latitude 38-37-00 and West Longitude 83-07-18.

[2] We note that Garrison is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 600 people. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-574

In the Matter of

Amendment of Section 73.202(b), RM-7534
Table of Allotments,
FM Broadcast Stations.
(Los Lunas, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Patricia Benns Komorowski ("petitioner") requesting the substitution of Channel 292C1 for Channel 292A at Los Lunas, New Mexico, and the modification of her construction permit for a new station on the Class A channel to specify operation on the higher powered channel. Petitioner states that she will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 292C1 for Channel 292A at Los Lunas, New Mexico, since it could provide the community with an additional wide coverage area FM service. Channel 292C1 can be allotted to Los Lunas in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in petitioner's construction permit.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 292C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 292C1 at Los Lunas or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Los Lunas, New Mexico	273C2, 292A	273C2, 292C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 292C1 at Los Lunas are North Latitude 34-49-19 and West Longitude 106-41-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-575

In the Matter of

Amendment of Section 73.202(b), RM-7236
Table of Allotments,
FM Broadcast Stations.
(Clarksburg, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by the Harrison Corporation ("petitioner") requesting the substitution of Channel 222A for Channel 224A at Clarksburg, West Virginia, and the modification of its license for Station WVHF-FM to specify operation on the alternate Class A channel. Petitioner states that it will apply for Channel 222A, if allotted.

2. Petitioner states that the substitution of channels is necessary in order to increase the power of Station WVHF-FM from its present 3 kW to 6 kW. Further, it states that operating with the higher power could enable the station to increase the population it serves from 98,321 persons to 128,961 persons over an area of 2,552 square kilometers. Our review of the proposal, however, shows that the allotment of Channel 222A at Clarksburg conflicts with the pending request of Oakland Radio Station Corp. to substitute Channel 222A for Channel 221A at Oakland, Maryland, and to modify its license for Station WXIE to specify the alternate Class A channel (RM-7358). Oakland and Clarksburg are located approximately 77 kilometers apart while the Commission's Rules stipulate a minimum distance separation of 115 kilometers for co-channel Class A allotments. The staff, however, has found that the conflict can be resolved if Channel 223A is proposed at Clarksburg in lieu of Channel 222A. Therefore, we will substitute Channel 223A for consideration in this proceeding.

3. Channel 223A can be allotted to Clarksburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.4 kilometers (2.7 miles) west of the community to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment is required since Clarksburg is located within 320 kilometers (200 miles) of the U.S.- Canadian border.

4. We believe the public interest would be served by proposing the substitution of Channel 223A for Channel 224A at Clarksburg, West Virginia, since it could enable Station WVHF-FM to expand its coverage area. In addition, we propose to modify the license of Station WVHF-FM to specify operation on Channel 223A in lieu of its present Channel 224A. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarksburg, West Virginia	224A, 285A, 293B	223A, 285A, 293B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 223A at Clarksburg are North Latitude 39-15-48 and West Longitude 80-23-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-586

In the Matter of

Amendment of Section 73.202(b), RM-7532
Table of Allotments,
FM Broadcast Stations.
(Pamplico, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Pamplico Broadcasting Limited Partnership ("petitioner") requesting the substitution of Channel 271C2 for Channel 271A at Pamplico, South Carolina, and the modification of its construction permit for Station WMXT to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 271C2 for Channel 271A at Pamplico, South Carolina, since it could provide the community with a wide coverage area FM service. Channel 271C2 can be allotted to Pamplico in compliance with the Commission's minimum distance separation requirements with a site restriction of 22.5 kilometers (14.0 miles) southwest to avoid a short-spacing to Station WKZQ-FM, Channel 269C2, Myrtle Beach, South Carolina, and Station WJSK, Channel 272A, Lumberton, North Carolina, and to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station WMXT to specify operation on Channel 271C2 in lieu of Channel 271A. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Pamplico.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pamplico, South Carolina	271A	271C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271C2 at Pamplico are North Latitude 33-52-15 and West Longitude 79-45-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re Applications of

SUNDOWN COMMUNICATIONS (hereafter Sundown)	File No. BPH-890612MI
MARIA M. OCHOA (hereafter Ochoa)	File No. BPH-890615ME
BOWMAN COMMUNICATIONS, INC. (hereafter Bowman)	File No. BPH-890616MK
FURNITURE CITY BROADCASTERS, INC. (hereafter Furniture City)	File No. BPH-890616MM
GATEWAY MEDIA LIMITED PARTNERSHIP (hereafter Gateway)	File No. BPH-890616MN
JANET W. LINGAFELT (hereafter Lingafelt)	File No. BPH-890616MO
MYSTIC RADIO CORPORATION (hereafter Mystic)	File No. BPH-890616MQ
FOOTHILLS BROADCASTING, INC. (hereafter Foothills)	File No. BPH-890616MR
R. DONNIE GOODALE (hereafter Goodale)	File No. BPH-890615MF (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 277A
in Lenoir, North Carolina

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: November 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Goodale.* The *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985) established a strict processing system for applications for construction permits on nonreserved FM broadcast channels. To be considered substantially complete or "tenderable", applications must meet precise tenderability standards set forth in Appendix D of the *Report and Order*. One critical element of tenderability is correct transmitter location coordinates.[1] Goodale's application indicates that the location of its transmitter is 35° 58' 40" N.L., 81° 34' 27" W.L. However the Commission's engineering study, based on the topographic map submitted by Goodale, indicates that the coordinates shown on the map are 35° 58' 40" N.L., 81° 34' *43* " W.L. This discrepancy cannot be resolved confidently and reliably within the confines of the application; therefore, the presence of the incorrect data will be treated as functionally equivalent to its absence in accordance with the procedure set forth in Appendix D.

3. Applications accepted for tender, but that are ultimately shown to be untenderable will be "returned as inadvertently accepted for tender and, if resubmitted, will not be accepted *nunc pro tunc*. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it." *Id.* Accordingly, due to the inconsistency in its transmitter location coordinates, Goodale's application will be returned as inadvertently acepted for tender. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989).

4. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Ochoa	November 3, 1989; June 15, 1990
Mystic	December 11, 1989; January 22, 1990

5. On May 4, 1990, Ochoa filed a Petition To Deny Or Dismiss Furniture City's application. Ochoa states that Furniture City's contour map does not clearly and legibly define the city boundaries of Lenoir, North Carolina. It is not clear, Ochoa claims, that the community of license is fully encompassed by the 70 dBu contour. Ochoa alleges that Furniture City's original application shows an arrow pointing to a "darkened smudge" purporting to represent the city of Lenoir. Therefore, Ochoa concludes, Furniture City's application should be dismissed, having been inadvertently accepted for tender.

6. We will deny Ochoa's petition. Ochoa relies upon *Karen S. Klehamer*, 5 FCC Rcd 2554 (1990), which states, *inter alia*, that applications whose contour maps are with-

out the boundaries of the city of license clearly indicated, or without a point on the map indicated as the city of license clearly within the 70 dBu contour, cannot be accepted for tender. In this case, Furniture City's contour map indicates Lenoir as a shaded area clearly within the 70 dBu contour. Accordingly, Ochoa's Petiton To Deny will be denied below.

7. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sundown has not completed Item 4 correctly. Sundown's application gives a post office box number as the residence address for Muriel D. Payne, Billy Jack Morgan, and Rebecca Pons Morgan. Accordingly, Sundown must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Foothills have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Foothills would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Bowman and Lingafelt have filed such statements, they are deficient. Bowman has not listed an acceptable recruitment source for African Americans, and Lingafelt has not listed specific recruitment sources for either African Americans nor women. Accordingly, Bowman will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Foothills would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED That pursuant to the discussion in paragraphs 2 and 3, *supra*, Goodale's application is HEREBY RETURNED as inadvertently accepted for tender.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Ochoa and Mystic ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That Ochoa's May 4, 1990 Petition to Deny or Dismiss Furniture City's application IS HEREBY DENIED.

15. IT IS FURTHER ORDERED, That Sundown shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bowman and Lingafelt shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing an application. Inconsistent data make it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. In other cases, absence of these data makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines the acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. § 73.318), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-433

In re Applications of

GARY SELLERS (hereafter "Sellers") — File No. BPH-891215ML

MOREHEAD STATE UNIVERSITY (hereafter "Morehead") — File No. BPED-891220MD

B & G BROADCASTING, INC. (hereafter "B & G") — File No. BPH-891220MH

RAY EDMUND PRESTON, II (hereafter "Preston") — File No. BPH-891220MI

For Construction Permit
for a New FM Station
in Paintsville, Kentucky
Channel 234C3 (94.7 MHz)

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: November 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Morehead.* Review of Morehead's application indicates that its financial certification is contingent upon receipt of a grant from the National Telecommunications and Information Administration, as well as either the receipt of a grant from a charitable organization, the approval of the budget of a school or university or an appropriation from a state, county, municipality or other political subdivision. Morehead has failed to notify the Commission of the receipt of funding from any of these sources. Accordingly, its application is financially deficient and an issue will be specified.

3. In addition, Morehead has filed its application on a FCC Form 340, which does not require that the applicant certify as to the availability of the site for its transmitting antenna. However, since the site availability certification attached as Appendix B to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985), applies only to applicants filing a FCC Form 301, the failure of noncommercial, educational applicants filing for commercial channels to certify as to the reasonable assurance of site availability will not result in the return of the application as untenderable. However, an appropriate site availability issue will specified since the applicant is otherwise subject to our commercial FM processing policies. *See Report and Order* in Docket 84-750, supra, at paragraph 37, note 35.

4. Finally, Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBU) contour, but on a showing of good cause may be located outside that contour. Morehead proposes to locate its main studio approximately 40 kilometers outside that contour in Morehead, Kentucky. However, it fails to show good cause for a waiver of our rule. Accordingly, an issue will be specified.

5. *Preston.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Preston has not completed Item 4 correctly. His application gives a post office box number as his residence address. Accordingly, Preston must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Other Matters.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by Morehead, B & G and Preston would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Morehead, whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 2, the applicant is financially qualified.

2. To determine, with respect to Morehead, whether the applicant has reasonable assurance that the site it proposes for its transmitting antenna will be available to it.

3. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the station's 3.16 mV/m contour by Morehead.

4. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Morehead, B & G and Preston would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, better serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Preston shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-429

In re Applications of

GOLDEN GULF COAST BROADCASTING COMPANY (hereafter "Golden")	File No. BPH-880914MF
HUGHES, MOORE AND BELL (hereafter "Hughes")	File No. BPH-880914MG
H. HUNTER WHITE, III (hereafter "White")	File No. BPH-880914MP
ROYAL BROADCASTING, INC. (hereafter "Royal")	File No. BPH-880914MU
OCEAN SPRINGS BROADCASTING CO. (hereafter "OSBC")	File No. BPH-880914MY
OCEOLA BROADCASTING, LTD. (hereafter "Oceola")	File No. BPH-880914NA
MARK ALBERT HINTERLANG (hereafter "Hinterlang")	File No. BPH-880909MG (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 223A (92.5 MHz)
in Ocean Springs, Mississippi

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: November 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hinterlang*. An engineering analysis reveals a discrepancy between the 40.84 meter height of radiation center above mean sea level (RCAMSL) listed in Section V-8, Item 7(b)(2), and that listed on the tower sketch attached as engineering exhibit E-2. The tower sketch lists the overall height of the tower above ground level (AGL) as 30.48 meters; this is confirmed in Section V-B, Item 7(a)(2). The RCAMSL listed in Item 7(b)(2) is obviously wrong because it would exceed the height of the proposed tower. The height which should have been specified (34.14 meters) was instead entered one line above in Section V-B, Item 7(b)(1), which called for the height of the antenna above ground level (AGL).[1] We note that all values specified on the tower sketch are internally consistent. However, on "page O" of Hinterlang's engineering exhibit, the applicant specifies the RCAMSL as 32 meters rather than the 34.1 meters on the antenna sketch; and on page 1 of the Exhibit, the applicant listed the RCAMSL as 33 meters.

3. In the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted a FM processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially complete." This approach benefits the public interest by reducing frivolous and speculative applications and streamlining our processing procedures to make more efficient use of our staff and other resources. Further, in Appendix D to the *Report and Order*, *supra*, we stated that "if any information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender." However, if the critical element cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instance, the defective application will be deemed not sufficient for tender. Thus, in the present case, these inconsistent data concerning radiation center heights make it impossible to determine whether Hinterlang is in compliance with the Commission's technical rules. Accordingly, Hinterlang's application will be dismissed as inadvertently accepted for tender.

4. *Golden*. In response to Section III, FCC Form 301, as to financial qualifications, Golden certified that it did not have sufficient funds available to complete construction and operate the requested facilities for three months without revenue. Accordingly, an appropriate issue will be specfied.

5. *Hughes*. An engineering study reveals a discrepancy between the 52 meters listed for the antenna height above average terrain (HAAT) in Section V-B, Item 7(b)(3) of Hughes' application and the 54.6 meters height calculated from the average of the eight radials listed in Section V-8, Item 19. This discrepancy does not effect the acceptability of Hughes' application since the use of either value for the antenna height above average terrain does not result in any violation of our technical rules. However, Hughes will be required to file a corrective amendment resolving this discrepancy with the presiding Administrative Law Judge within 30 days of the release of the Order.

6. *Environmental*. An analysis by the Commission's staff has revealed that Hughes' proposal may significantly exceed the ANSI guidelines for human exposure to radio

frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Hughes may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Hughes may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, he will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. In this regard, if the site is presently fenced in compliance with the guidelines, Hughes is required to so state and give the distance from the base of the tower to the fence. Accordingly, Hughes will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provision of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 307 (1980).

7. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although OSBC has filed such statement, it is deficient. OSBC has not listed specific recruitment sources for African Americans. Accordingly, OSBC will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. Royal principal Crystal Thoma is an employee (she does not say in what capacity) of television station WLOX, Biloxi, Mississippi. Due to the proximity between Biloxi and Ocean Springs, Thoma's ownership interest in the instant application and employment at WLOX could violate the Commission's cross-interest policy. However, Thoma has promised to divest herself of any interest in or connection with WLOX prior to the commencement of program test authority. Accordingly, an appropriate condition will be specified.

9. Information before the Commission indicates that Royal was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Royal's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Royal in this proceeding.

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Hughes	January 25, 1990
White	January 5, 1990
OSBC	October 6, 1989

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Golden, whether the applicant is financially qualified.

2. If a final environmental impact statement is issued with respect to Hughes in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Royal.

4. To determine whether Royal's organizational structure is a sham.

5. To determine, from the evidence adduced pursuant to Issues 3 and 4 above, whether Royal possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the application of Hinterlang IS HEREBY RETURNED as inadvertently accepted for tender.

15. IT IS FURTHER ORDERED, That Hughes shall file the engineering amendment specified in paragraph 5 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That in accordance with paragraph 6 above, Hughes shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, OSBC shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That, in the event of grant of Royal's application, Crystal Thoma will be ordered to divest herself of all interests in and sever all connections with Station WLOX-TV, Biloxi, Mississippi prior to the commencement of program test authority.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Hughes, White, and OSBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The specification of 34.14 RCAGL is also obviously incorrect, as it too would place the antenna higher than the proposed tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-434

In re Applications of

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "Group")	File No. BPH-880523MF
SUN COAST BROADCASTING COMPANY (hereafter "Sun")	File No. BPH-880523MG
GWENDOLYN G. ROWLAND (hereafter "Rowland")	File No. BPH-880523ML
WTET LIMITED PARTNERSHIP (hereafter "WTET")	File No. BPH-880523MM
WILSON BROADCASTING CO., INC. (hereafter "Wilson")	File No. BPH-880523MO
MARGARITA BOUZA FERNANDEZ (hereafter "Fernandez")	File No. BPH-880523MP
INDIAN RIVER BROADCASTING, INC. (hereafter "River")	File No. BPH-880523MS
DENETTE SCHWEIKERT (hereafter "Schweikert")	File No. BPH-880523MT
VERO BEACH COMMUNICATIONS, INC. (hereafter "VBCI")	File No. BPH-880523MV
ORCHID ISLE COMMUNICATIONS, INC. (hereafter "Orchid")	File No. BPH-880523MW
FISHER BROADCASTING, INC. (hereafter "Fisher")	File No. BPH-880523MY
COASTAL COMMUNICATIONS FM RADIO LIMITED PARTNERSHIP (hereafter "Coastal")	File No. BPH-880523MZ
MEDIA VI, A FLORIDA GENERAL PARTNERSHIP[1] (hereafter "Media VI")	File No. BMPH-880523NA
JOHN D. EARMAN (hereafter "Earman")	File No. BPH-880523NF
JOANN RADAKOVIC (hereafter "Radakovic")	File No. BPH-880523MR (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel
259C2 (99.7 MHz) in Vero
Beach, Florida

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: November 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* In Section V-B, Item 2 of Radakovic's application (and in her associated application to the Federal Aviation Administration), Radakovic lists the coordinates for her proposed transmitting site as 27 degrees-49 minutes-*49* seconds North Latitude, 80 degrees-29 minutes-27 seconds West Longitude. According to our analysis of her site map (Exhibit 2A), the set of latitudinal coordinates therein is 27 degrees-49 minutes- *59* seconds. Since there is no evidence within the application as a whole to resolve this discrepancy, it is impossible to determine whether the proposal is in compliance with the Commission's Rules. This data, consistently specified, is critical to processing the application. An inconsistent set of coordinates makes it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. Further, an inconsistent set of coordinates makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. Finally, the exact coordinates are necessary in determinations regarding protection to FCC monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), and are essential in staff analysis of an applicant's environmental and electromagnetic effects on nearby communications facilities. Accord-

ingly, Radakovic's application must be dismissed as inadvertently accepted for filing. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989).

3. *Group*. In its application to serve DeWitt, Michigan on Channel 243A, a character qualifications issue was specified against Group to determine whether its application was appropriately certified. *Lansing Community College*, 3 FCC Rcd 5491 (1988). As the applicant correctly notes in its September 7, 1989 amendment, this issue, "technically speaking, remain[s] outstanding" against Group. The applicant argues that this issue need not be reinstated in the instant proceeding since petitions seeking the issue in both the San Angelo, Texas and Windsor, Virginia proceedings "were denied by the Administrative Law Judge presiding in the case." We agree. In a nearly identical situation, the presiding Administrative Law Judge denied a petition to specify a "false certification" issue against Group based on a certification provided three days *before* the engineering portion of the application to serve Windsor, Virginia was certified. In his ruling, the Judge found Group's "certification false in a technical sense only, and does not warrant the addition of an issue." *Tidewater Broadcasting*, FCC 88M-4412 (released December 27, 1988).

4. *Rowland*. Rowland proposes to place her transmitting antenna on a new 55-meter antenna located 0.8 kilometers Northwest of Sebastian, Florida. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Rowland may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Rowland's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must address whether the site will be fenced in compliance with the guidelines and, if so, the distance from the base of the tower to the fence. Accordingly, Rowland will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of Rowland's Environmental Assessment, that Rowland's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* Section 1.1308(d) of the Commission's Rules.

5. Rowland concedes in Exhibit ENG-6 of her application that the entire community of license of Vero Beach "lies just outside" her predicted 3.16 mV/m contour, contrary to the requirement in 47 C.F.R. § 73.315(a). While Rowland requests waiver of the rules, we note that all other proposals to serve Vero Beach on Channel 259C2 provide the required coverage. Accordingly, an issue will be specified.

6. *Wilson*. On September 12, 1988, Wilson filed an amendment as of right to change its proposed transmitting antenna site to a location at 1660 North Indian River Drive in Sebastian, Florida. This site was chosen, the applicant explained, "since non-short-spaced sites are available and would preclude grant of the waiver request in Wilson's [tendered] application." This expectation was reasonable. While staff review of Wilson's amendment reveals that it fails to meet the spacing requirements of 47 C.F.R. § 73.207 with respect to the licensed (BLH-870318KB) facilities of second-adjacent channel Class A station WLRQ-FM (Cocoa, Florida), public notice had been provided the week prior to the filing of this amendment that WLRQ had received Commission permission to upgrade its facilities to Class C2 status. *Report and Order* in MM Docket 87-527, 53 Fed. Reg. 34300 (September 6, 1988).[2] There was, however, a contradiction within the *Report and Order* about the reference coordinates for this modification. While the narrative stated that "Channel 257C2 can now be allotted to Cocoa in compliance with the Commission's minimum distance requirements without the imposition of a site restriction," the associated footnote listed reference coordinates approximately 9 kilometers Northwest of WLRQ's licensed site. *Report and Order, supra*, at paragraph 4.

7. This contradiction is critical to any consideration of Wilson's amendment. If the footnoted reference coordinates are considered, Wilson's *de minimis* short-spacing could be waived given the fact of compliance with the spacing requirements to WLRQ's upgraded facilities. Conversely, the continued use of WLRQ's licensed site coordinates would result in a short-spacing of 3.6 kilometers to the Cocoa station's upgraded facility. [3] We do not believe Wilson should be penalized for the Commission's confusion on this matter. Therefore, Wilson will be permitted to submit the appropriate amendment curing its spacing deficiency with the presiding Administrative Law Judge.

8. In response to Section III regarding the applicant's financial qualifications, Wilson certified that neither sufficient net liquid assets nor sufficient funds were on hand or available "to construct and operate the requested facilities for three months without revenue." The appropriate issue will therefore be specified.

9. *River*. Information before the Commission indicates that River was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question River's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against River in this proceeding.

10. Items 5(b) and (e) of Section II, FCC Form 301 (October 1986) require, respectively, applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application which has been dismissed with prejudice by the Commission" and/or an interest "in any pending or concluded Commission proceeding which left unresolved character issues against the applicant." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. While River indicated that nonvoting shareholder Ravindrakumar J. Patel held an interest in Voorheesville, New York applicant Tri-Cities FM Limited Partnership (File No. BPH-871216MG), it neglected to indicate that Tri-Cities' application was dismissed with prejudice, prior to resolution of the character issues specified against it, for failing to file a notice of appearance and pay the required hearing fee. *Sound of Life, Inc.*, FCC 90M-71 (released January 11, 1990). Since River failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of these facts, an appropriate issue will be specified below.

11. *Fisher*. On October 10, 1989, Fisher submitted an amendment to relocate its transmitting antenna. In support of its late-filed amendment, the applicant stated that "[t]he old site was in the very small area not short-spaced to any existing station, but that area presented intractable air space problems." As noted in paragraph 18 below, this amendment is acceptable for filing. However, Fisher's proposal to topmount on an existing tower approximately 3.5 kilometers southeast of Sebastian, Florida did not provide the required certification of reasonable assurance of site availability. An appropriate issue will therefore be specified.[4]

12. *Earman*. Earman proposes to place his transmitting antenna on a new 160-meter tower in Sebastian Inlet State Park, conceding in his response to Section VII, Item 2 that he does not have reasonable assurance that this site will be available for his intended purpose. In Exhibit No. 3 to his application, Earman indicated that "[p]ermission to use a site within the park has been requested from the state, and the Commission will be kept advised of the progress made." The applicant has failed to do so, despite evidence in Coastal's application that documents that the State of Florida rejected Earman's application to use the park on May 25, 1988. *Letter to Mr. John D. Earman from Nevin Smith, Deputy Director, Support Services, Division of Recreation and Parks*, Attachment C to Coastal's August 3, 1989 amendment. Accordingly, a site availability and Section 1.65 issues will be specified.

13. *Other matters*. On January 6, 1988, the Commission modified the Table of Allotments (47 C.F.R. § 73.202) to change the license of Station WKSY-FM (Jupiter, Florida) from Channel 296A to Channel 258A. *Report and Order* in MM Docket 87-233, *supra*. This change was effective on March 28, 1988, less than a month before the effective date of the Rule Making allotting Channel 259C2 to Vero Beach. *See Report and Order* in MM Docket 86-284, 3 FCC Rcd 1049 (1988). Four of the captioned applications (Schweikert, VBCI, Fisher and Coastal) are short-spaced to the reference coordinates for the Jupiter modification, and all have requested treatment pursuant to 47 C.F.R. § 73.215. Our studies confirm that each complies with the contour protection requirements of § 73.215, and their applications are therefore acceptable.

14. Our attempts to obtain FAA clearance for Group, WTET, Wilson, River, Media VI and Earman through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Further, the Federal Aviation Administration has determined that Sun's proposed transmitting antenna location would be a hazard to air traffic. Finally, Fernandez and Orchid have stated in various amendments that the FAA has determined that their respective proposals would constitute a hazard to air traffic. Accordingly, issues with respect thereto will be included and the FAA made a party to the proceeding.

15. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although River and Earman filed such statements, both are deficient. River did not list a minority organization it proposed to utilize for recruitment purposes; Earman failed to list a women's organization he proposed to utilize for recruitment purposes. Accordingly, both will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

16. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither WTET nor River completed Item 4 correctly. WTET did not provide any address for party Dorethea L. McGriff; River provided a post office box number as the residence address for parties Marcia H. Littlejohn, Robert L. Brackett, John H. Sutherland and D. Rodney Rudisill. Both will therefore be required to

amend these responses by submitting the required information to the presiding Administrative Law Judge after this Order is released.

17. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after October 24, 1988, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Group	October 27, 1988; February 17, June 1, August 8, September 7 and October 27, 1989; July 18, 1990
Sun	May 29, 1990
Rowland	November 30, 1988; September 20, 1989 February 7 and July 9, 1990
River	December 12, 1988; May 5, November 16 and 27, 1989
VBCI	June 29 and August 31, 1989
Fisher	July 26, 1989; April 3 and May 11, 1990
Coastal	April 10, 1989
Media VI	December 11, 1989

18. Schweikert (on June 7, 1990), VBCI (on April 17, 1990), Fisher (on October 10, 1989) and Coastal (on August 3, 1989) petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

19. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Rowland in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether Rowland's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

3. To determine with respect to Wilson whether the applicant is financially qualified.

4. To determine whether Sonrise Management Services, Inc. is an undisclosed party to River's application.

5. To determine whether River's organizational structure is a sham.

6. To determine whether River violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report that an application in which one or more of its partners has an ownership interest was dismissed with prejudice with an unresolved character issue pending.

7. To determine, from the evidence adduced pursuant to Issues 4 through 6 above, whether River possesses the basic qualifications to be a licensee of the facilities sought herein.

8. To determine whether Fisher has reasonable assurance that the transmitter site specified is available to it.

9. To determine with respect to Earman (a) whether the applicant has reasonable assurance that the transmitter site specified is available to it; (b) whether Earman violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report that his proposed site had been rejected by the State of Florida; and (c) in light of the evidence adduced pursuant to issues (a) and (b) above, whether Earman possesses the basic qualifications to be a licensee of the facilities sought herein.

10. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Group, Sun, WTET, Wilson, Fernandez, River, Orchid, Media VI and Earman would constitute a hazard to air navigation.

11. To determine which of the proposals would, on a comparative basis, best serve the public interest.

12. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the application filed by Radakovic IS HEREBY DISMISSED as inadvertently accepted for filing.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Rowland shall submit the environmental assessment required required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

24. IT IS FURTHER ORDERED, That Wilson must submit the amendment detailed in paragraph 7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

26. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, River and Earman shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

27. IT IS FURTHER ORDERED, That WTET and River shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

28. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group, Sun, Rowland, River, Schweikert, VBCI, Fisher, Coastal and Media VI ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

29. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Media VI is the licensee of FM Station WAVW (formerly WCXL), currently serving Vero Beach on Channel 269A. The tendered application was filed as a major change of the WCXL facility by Treasure Coast Media, Inc. On August 19, 1989, the Commission granted the application of Treasure Coast Media (BALH-890629HD) assigning WAVW's license to Media VI. The sale of this station was consummated on October 27, 1989. Therefore, the captioned application, if granted, would modify Media VI's license from Channel 269A to Channel 259C2.

[2] This modification of WLRQ's license was effective October 13, 1988.

[3] WLRQ's minor change application (BPH-890515IF) specified its licensed site, and requested waiver of the spacing rules to permit short-spacings ranging from 3.2 to 5.2 kilometers to seventeen of the applications filed in the subject Vero Beach allotment window.

[4] VBCI, specifying the same site in its April 17, 1990 amendment, indicated that it secured assurance of site availability from Ken Vickers, the general manager of Falcon Cable Media, L.P. and agent for the owner of the listed site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-432

In re Applications of

THE CROMWELL GROUP, INC. (hereafter "Cromwell")	File No. BPH-880727MM
MARIANNE WARNOCK (hereafter "Warnock")	File No. BPH-880727NE
ABSOLUTE BROADCASTING COMPANY (hereafter "ABC")	File No. BPH-880728MD

For Construction Permit
for a New FM Station on Channel 290A
in Wilmore, Kentucky

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: November 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Cromwell*. In its *Report and Order* in Docket 88-31, 5 FCC Rcd 2826 (1990), the Commission amended the FM Table of Allotments, changing Channel 242A in Wilmore, Kentucky to Channel 290A. The applicants in this proceeding were served a copy of the *Report and Order* and required to amend their applications. Cromwell has not amended its application. Accordingly Cromwell will be required to file an amendment changing from Channel 242 to Channel 290 with the presiding Administrative Law Judge.

3. *Warnock*. Warnock proposes to co-locate the proposed antenna on existing tower of WDKY-TV. The coordinates listed on V-B item 2(b) are 37^0 47' 18" NL and 84^0 40' *49* " WL. These coordinates correspond to the information on file with the Federal Aviation Administration and our Antenna Survey Branch. However, the applicant's transmitter site map (fig. 3) shows the coordinates of the proposed tower plotted at 37^0 47' 18" NL and 84^0 40' *53* " WL. Because Warnock clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, drawing on the application as a whole, confidently verify the transmitter location by taking official notice of the site coordinates and tower height as found in the Commission's files for the licensed co-located facility. Accordingly, Warnock's application was found to be acceptable for filing; however, Warnock shall be required to file a corrective amendment to her application with the presiding Administrative Law Judge within 30 days of the release of this order.

4. *ABC*. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by ABC would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. ABC has not completed Item 4 correctly. ABC's application gives a street name as the residence address for Suzette C. Trent. Accordingly, ABC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Other Matters*. Warnock (on July 17, 1990) and ABC (on July 12, 1990) petitioned for leave to amend their applications after December 29, 1988, the last day for filing amendments as of right. The subject amendments were required by 47 C.F.R. § 73.3514. Consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

7. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Cromwell	February 22, 1989; July 27, 1989 May 10, 1990
Warnock	May 19, 1989

8. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the ABC would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Cromwell shall file an amendment to its application changing from Channel 242A to Channel 290A with the presiding Administrative Law Judge within 30 days of the release of this order.

12. IT IS FURTHER ORDERED, That Warnock shall file a corrective amendment with respect to paragraph 3 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That ABC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Warnock, Cromwell and ABC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionaliy, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-526

In the Matter of

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License — RM-6122

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 30, 1990

By the Commission: Commissioner Quello issuing a separate statement.

1. The Commission has before it three petitions for reconsideration of the *Report and Order* (*R & O*), 4 FCC Rcd 4870 (1989), which amended Section 1.420 of the Commission's rules to provide a procedure whereby the Commission may modify television and FM authorizations to specify a different community of license in the course of a rule making proceeding.[1] The National Association of Broadcasters ("NAB"), Sinclair TeleCable, Inc. ("Sinclair"), and Harron Communications Corporation ("Harron") filed petitions for reconsideration.[2] Brantley Broadcast Associates ("Brantley") filed reply comments. Word of God Fellowship, Inc. ("Word of God") and Kudzu Broadcasting Partnership ("Kudzu") filed reply comments to the Sinclair and NAB petitions. [3]

2. The *R & O* noted that past Commission policy worked to discourage the filing of proposals to change a station's community of license because, if such a proposal were adopted and the allotment changed, third parties would then have an opportunity to file competing applications for the new allotment. The *R & O* stated that the possibility of such applications being filed, and the attendant risk that the incumbent station would lose *any* authorization to broadcast, acted as powerful disincentives to the filing of such proposals. The Commission observed, however, that changes in a station's community of license would serve the public interest in some circumstances. Therefore, the new rule was designed to remove an unnecessary barrier to the improvement of service by existing licensees and permittees. In order to insure that the new subsection served this purpose, the *R & O* stated the Commission's policy that petitions requesting a change in community of license filed pursuant to Commission rule 1.420(i) would be approved if an allotment to the new community would serve the Commission's allotment priorities and policies[4] better than the allotment in the old community, and if the change would not have the effect of depriving a community of an existing service representing its sole local transmission outlet. We stated that we would determine whether a proposed change would better serve the allotment priorities than the existing allotment by comparing the proposed allotment plan to the existing allotment plan for the communities involved. If adoption of the proposed allotment plan would result in a net service benefit for the communities involved (that is, if the plan would result in a preferential arrangement of allotments), we would adopt the proposal. Three parties filed petitions for reconsideration in response to the *R & O*. None challenges our core determination that the rule removes an unnecessary and artificial barrier to service improvements. Instead, the parties focus on questions concerning the scope and applicability of the new rule. In a further effort to insure that Section 1.420(i) serves its intended purpose, this *Memorandum Opinion and Order* (*MO & O*) grants reconsideration in some respects, denies it in others, and clarifies the applicability of Section 307(b) of the Communications Act to proceedings to amend the FM and TV Tables of Allotments.

PETITIONS FOR RECONSIDERATION

3. In its petition for reconsideration, NAB first argues that the Commission should indicate in the text of the rule that changes in community of license will be limited to situations furthering the goals stated in Section 307(b) of the Communications Act of 1934, as amended. NAB argues that application of the FM and television allotment priorities as the test of whether a change in community of license should be approved is inadequate to prevent migration of stations to larger urban communities. NAB fears that the flexibility inherent in the fourth FM and fifth television allotment priorities could allow licensees to undermine the goals of Section 307(b) by abandoning rural, less populated, and underserved communities in order to seek enhanced financial opportunity in urban areas. NAB suggests that the Commission require petitioners to demonstrate that a change in community of license would further the Commission's Section 307(b) objectives. NAB also requests that the Commission define "local transmission service" for purposes of the limitation on removing the only local transmission service from the community, claiming that the *R & O* provides limited guidance to parties and the Commission staff. NAB specifically asks if an AM daytime-only service constitutes a local transmission service. Furthermore, NAB fears that the Commission's requirement that a change in community of license will be approved only if the move would not remove a community's sole local broadcast service creates a "service floor" that may lead stations to request moves rather than risk remaining the only local transmission service in a community. NAB believes that it is unrealistic for the Commission to adopt a numerical local service floor that would apply to every community. Instead, NAB suggests that the Commission employ a case-by-case analysis examining the entire range of media services available in a community to determine whether a station should be permitted to change its community of license.[5] Finally, NAB notes that the rule could allow a permittee to change its community of license without providing service to its original community and without any service improvements for either the new or the old community, and suggests that the Commission require a licensee to serve its original community of license for a specified period of time before approving a change.

4. Sinclair objects to the restriction on removal of a community's only local transmission service. Sinclair claims that the *Notice of Proposed Rule Making* in this proceeding did not discuss this restriction, and, therefore, interested parties could not comment on that aspect of the proceeding. With respect to the substance of the restriction, Sinclair maintains that the Commission failed to provide a reasoned basis for adopting this limitation because it has not established a factual basis for its concerns. Sinclair claims there is no similar policy in the AM service, and therefore the restriction creates a double standard with no justification for the restriction in the FM and television services. Sinclair argues that the allotment priorities can be advanced through the provision of a first local service to a significantly larger community regardless of the number of services remaining in the original community of license. Sinclair argues that if the restriction is retained, it should be limited to specific instances in which there may be a legitimate concern regarding removal of local service.

5. Sinclair seeks clarification of the Commission's views of various scenarios that could arise under the limitation. For instance, Sinclair asks what would happen if a community had two FM stations, or an AM and an FM station, and each sought to change its community of license, citing the other station as the remaining service. Sinclair also asks if a television service must remain in a community if a television licensee seeks to move, or if the presence of a radio station is sufficient.

6. Sinclair proposes that, should the Commission retain the limitation on removal of sole local broadcast service, certain changes in community of license should be exempt from the restriction. Sinclair suggests that licensees located within a metropolitan area should be permitted to move within the same metropolitan area or to another metropolitan area, and that licensees located in a rural area should be permitted to move to another rural area, regardless of whether the move would deprive the community of its sole local transmission service. Sinclair argues that this exception would recognize that opportunities may exist for stations, particularly in conjunction with a channel upgrade or other technical improvement, to be licensed to communities that may not have originally been the most desirable locations. Furthermore, Sinclair claims that in metropolitan areas other reception services will remain available to the original community of license.

7. In reply, Brantley agrees with Sinclair that the restriction on removal of sole local transmission service contradicts the Commission's policy of maximum utilization of the spectrum. Brantley argues that NAB's fear of a mass migration of stations from rural to urban communities is unfounded, and that NAB seeks to restrict the Commission from exercising any versatility under this procedure. Brantley claims that NAB fails to consider that minimum distance separation requirements[6] will prevent most stations from relocating their antenna sites to urban areas.

8. Word of God supports Sinclair's petition for reconsideration, claiming that the Commission adopted its restriction on removal of sole local broadcast service without adequate notice and opportunity for comment. Word of God argues that if the sole local broadcast service limitation is retained, the Commission should exempt unbuilt facilities from the limitation. Word of God claims that this exemption is justified because an unbuilt facility cannot be considered to provide existing service to a community. It argues that the Commission should consider in the case of unbuilt facilities whether other channels in the same service area are available to the community, either as allotted but unassigned channels or through a petition for rule making, and the extent to which the community could receive service from the unbuilt facility if it moved. Word of God claims that the Commission should base its evaluation on the totality of service improvements available.

9. Kudzu also supports Sinclair's petition for reconsideration. Kudzu claims that deleting the restriction on removal of sole local transmission service would be consistent with other Commission rules, such as the main studio rule,[7] that are designed to enhance licensee flexibility.

10. In its petition for reconsideration, Harron argues that the Commission should not limit the use of the rule to instances in which a licensee files a rule making petition and a simultaneous request for modification of license. Harron notes that this requirement prohibits use of the procedure by a television licensee seeking to reassign to the community specified in the Television Table of Allotments a channel licensed to another community pursuant to the Commission's former "15 mile" rule.[8] Harron believes that forcing these licensees to file a major change application virtually guarantees that service improvements by that station will not occur. Harron argues that this procedure creates an artificial distinction between two groups of licensees in which the Commission treats a modification of license to specify a community added by an amendment to the Table of Allotments as a minor change, whereas a modification of license to specify the community listed in the Television Table of Allotments is classified as a major change and subject to competing applications. Harron proposes that the Commission amend Section 73.3572(a)(1) of its rules to reclassify as a minor change an application for modification of license in which a licensee seeks to reassign a channel to its allotted community.[9]

DISCUSSION

11. *Section 307 (b).* With respect to NAB's request to state in the text of Commission rule 1.420(i) that the rule can only be used to further the goals of Section 307(b), we believe it is axiomatic that our allotment priorities and policies are and should be applied consistent with and in furtherance of the goals of Section 307(b) of the Act. As we stated in the *R & O*, proposals filed pursuant to the new rule will be examined in light of our longstanding allotment priorities and policies, and must advance the priorities in order to be granted. Although we did not specifically state in the *R & O* that these priorities and policies were adopted and have been applied consistent with and in order to advance the goals of Section 307(b), that proposition is amply evident from the documents adopting and applying the priorities and policies. To insure that our intent is clear, however, we hereby state unequivocally that Section 1.420(i) was adopted to further the Commission's long standing pursuit of the goals underlying Section 307(b) of the Act, and that any changes in the FM and TV Tables of Allotments must be consistent with those goals. Furthermore, we take this opportunity to clarify and expand upon the *R & O*. In doing so, we address the NAB's specific concerns that the

flexibility inherent in the Commission's "residual" allotment priority of "other public interest matters" will lead to results inconsistent with Section 307(b), and that the new procedure could result in the migration of stations from rural to urban areas, contrary to the intent of Section 307(b). Therefore, we do not believe it necessary to specifically incorporate statutory provisions in the rule. Not only is such a reference unnecessary, but including it in only one of the many rules which carry out the objectives of Section 307(b) could lead to confusion and needless quibbling over the objectives of other rules.

12. With respect to the NAB's concern that the "other public interest matters" category of our FM and TV allotment priorities may provide too much flexibility to licensees and permittees seeking changes of community, it appears that the NAB is concerned that if a proposal does not implicate higher priorities such as first reception service or first local service, it will automatically be approved. We wish to dispel any such concern. Consistent with longstanding practice applying these residual categories, if the Commission is presented with conflicting options, such as the option of retaining the existing arrangement of allotments or adopting a new arrangement of allotments, it will adopt the proposal which best discharges the Commission's statutory mandate. Among other factors relevant pursuant to Section 307(b), the Commission considers under these residual categories the location of the proposed allotment with respect to other communities, and the availability of other services in the communities affected by the proposed change. Under these circumstances, it is proper for the Commission to consider whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change.[10]

13. With respect to the NAB's concern that the new procedure will result in the wholesale migration of stations from rural to urban areas, as we indicated in the *R&O*, there are two significant constraints on stations' ability to make such moves. One is the spectrum congestion that characterizes urban areas. The second is the way we apply the Commission's allotment priorities to analyze proposed changes. In those cases in which congestion does not, as a threshold matter, foreclose reallotment of a channel from an underserved rural area to a well-served urban area, application of our allotment criteria should achieve this result. Consistent with precedent, we do not intend to apply the first local service preference of our allotment criteria blindly. We recognize that an inflexible application of that preference, without further analysis, could consistently result in our finding that a reallotment leading to first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a more remote community. We wish to dispel any concern that our new rule would lead to such a result.

14. In the *R & O* we stated that the Commission's policy is to apply the allotment priorities in a flexible manner where circumstances warrant. It has never been Commission policy to adhere rigidly to the concept of localism if the result of that adherence is to undermine the fair, equitable, and efficient distribution of radio service mandated by Section 307(b) of the Communications Act. We have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies.[11] We see no reason to depart now from this policy, and we believe it is fully applicable in proceedings to amend the FM and TV Tables of Allotments.

15. *Absolute Restriction on Removal of Sole Existing Local Transmission Service.* In its petition for reconsideration, Sinclair argues that the *R & O*'s restriction on removal of an existing service representing a community's sole local transmission service was adopted without sufficient notice in contravention of the Administrative Procedure Act. We note, however, that the final rule adopted in a proceeding need not be identical to the proposed rule, but must be a "logical outgrowth" of the rule making proceeding.[12] The notice must "fairly apprise interested persons of the subjects and issues [of the rule making]."[13] The *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6890 (1988), specifically requested comment on our initial view that we should only use this procedure if the new community of license would serve our allotment priorities and policies. We believe that the restriction on removal of sole local transmission service was sufficiently related to our allotment priorities that it was a "logical outgrowth" of our original proposal.

16. The prohibition on the removal of an existing station representing a community's sole local broadcast service furthers our statutory mandate. Although this prohibition might, as a theoretical matter, appear to elevate the provision of local (i.e. transmission) service to our highest priority, there are virtually no populated areas of the country where our higher allotment priorities, such as first reception service, have not been attained. Therefore, as a practical matter, provision of first local service is the highest of our allotment priorities which remains in any significant degree unsatisfied. Under these circumstances, we believe a prohibition against the removal of local service is warranted, since such an action could result in diminishment rather than enhancement of local service.

17. While we continue to believe that a prohibition on the removal of local service is justified because such changes presumptively disserve the public interest, we also wish to clarify that, in the rare circumstances where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population, we will entertain requests to waive the prohibition. Allowing waivers of this prohibition should reduce the possibility, noted by the NAB, that a service floor could induce licensees to seek to change their communities of license in order to avoid the possibility that they may be the only remaining service in the community, because the sole licensee in a community may seek such a change under appropriate circumstances. Furthermore, allowing waivers will avoid any inconsistencies in the application of our allotment priorities. First local service constitutes the second most important of the FM and TV allotment priorities, whereas in both services provision of first reception service is considered a higher priority. (In the FM service, provision of second reception service is a priority co-equal in importance to first local service. *See* note 4, *supra*.) However, the *R & O* did not impose a prohibition against the removal of first (or, in the case of FM, second) reception service from an area. Therefore, our actions in the *R & O* could be interpreted as a reordering of the FM and TV allotment priorities by which first local transmission ser-

vice is considered of a higher priority than first reception service. This was not our intention, as we stated in the *R&O* that we would continue to apply the existing allotment criteria and the associated body of precedent to all requests seeking a change in community of license. Allowing waivers precludes any possibility that our action could be construed as a modification of the allotment criteria.

18. Although we believe some waivers may be warranted in order to insure that we fulfill our statutory mandate, we wish to emphasize that a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest. Moreover, the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver. In each instance, the proposal must be viewed in light of our policies and precedent under Section 307(b) of the Communications Act. To take one example, suppose a party sought to reallot a channel from a smaller, underserved, and isolated community to a larger suburban community which has no local transmission service but which receives numerous signals from the adjacent metropolis. If we rigidly applied our allotment priorities, without regard to the fact that the suburban community is located in an urbanized area, we would conclude that an allotment to either the isolated community or the suburban community would serve the same priority of first local service. Because proposals that serve the same priority are analyzed based on which proposal would provide the service to the larger population, the suburban community, with its larger population, might be preferred, and, therefore, a waiver might be warranted. If, however, after examining the factors enumerated in our decision in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990),[14] we were to conclude that awarding a first local service preference to the proposed allotment in the urban area would appear to condone an artificial and unwarranted manipulation of the Commission's policies, no such preference would be awarded. Instead, the allotment would be considered as simply an additional allotment to the urban area. In such cases, therefore, no waiver to allow the change would be granted. Retention of the sole local service in the rural community would be preferred, since a first local service is generally a higher priority than an additional allotment to a community that already enjoys local service.

19. While we believe waivers of the prohibition on the removal of an existing service representing a community's sole local transmission service may be warranted in limited circumstances, we note that in another respect this prohibition could be construed as unduly permissive. Specifically, to the extent this prohibition implies that we are concerned with disruption of existing service only if the disruption involves a first local transmission service, it was unduly permissive. The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.[15] We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to "existing service" occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set. Therefore, in analyzing proposals pursuant to Section 1.420(i), we intend to examine the effect of the proposal on existing service to the public particularly closely.[16]

20. *Relevant Stations for Comparative Analysis.* In response to Sinclair's request, we restate longstanding practice and policy to clarify which are the relevant stations for analyzing a proposal pursuant to Section 1.420(i). Consistent with our treatment of video and audio broadcast services as two distinct services, in a proceeding to change the community of license of a television station, we will not consider the availability of aural services in the community, nor will we consider the availability of video services in a community when examining an FM proposal. Because AM and FM stations are considered to be joint components of a single aural medium,[17] however, in a proceeding to change the community of license of an FM station, we will examine the availability of FM and AM services. Consistent with Commission precedent,[18] we will consider both daytime and full-time AM stations as local aural transmission services. Finally, both commercial and non-commercial stations are relevant to our analysis.[19]

21. *Continued Service to Community.* NAB suggests that the public interest requires that a licensee or permittee provide service to its community of license for a period of time before it requests a change in community. We believe that, in most instances, such a requirement would result in the delay of service improvements that could otherwise follow approval of a change in community of license. However, we do believe that NAB's concern would be warranted if a situation were to arise where a licensee or permittee proposed to change its community of license, and that licensee or permittee had received in a comparative hearing a decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community. Qualitative enhancements for local residence and daytimer preferences, for instance, have a particular nexus with the community of license. In such cases, we will not accept petitions to change community of license before or during the first year of station operation. In order to facilitate processing of cases which might implicate this concern, petitioners who are permittees or have been licensees for less than one year should state in their petitions whether they obtained a construction permit in a comparative hearing, and, if so, whether the petitioner sought the type of preferences with which we are concerned. Further, in order to prevent permittees from undermining this limitation by operating minimal facilities during the first year of station operation, we do not foresee granting construction permit modifications which would substantially lessen technical service to the public from that level proposed and authorized in the original construction permit.

22. *TV " 15 Mile " Rule Stations.* Harron's petition for reconsideration identifies a potential difficulty for a number of television licensees in using new Section 1.420(i). Under the Commission's former "15 mile" rule, an applicant applying for a vacant television allotment could propose as the community of license for that channel any

community within fifteen miles of the community specified in the Television Table of Allotments. If that application was granted, the license for the station was issued for the community specified in the application, but the city listed in the Table of Allotments remained unchanged. In conjunction with BC Docket No. 80-90, the Commission modified the FM Table of Allotments to conform its provisions to the actual usage of channels assigned pursuant to a similar rule for the FM service. *See Public Notice*, 2 FCC Rcd 6180 (1987). However, the Commission never modified the Television Table of Allotments to conform its provisions to the actual usage of channels by licensees. As a result, a television licensee licensed pursuant to the "15 mile" rule that wishes to modify its community of license to specify the community originally listed for the allotment in the TV Table of Allotments cannot seek the change in a rule making proceeding because the change requires no alteration to the allotment specified in our rules. Therefore, we are directing the staff to amend, at the earliest practicable date, the Television Table of Allotments so that the Table accurately reflects the community at which channels assigned under the "15 mile rule" are used. This will ensure that no television licensee is foreclosed from invoking rule making proceedings pursuant to this rule. Until the ministerial task of reissuing the Table is completed, we will allow licensees seeking to modify their assignments to the community listed in the Table to request such a modification by filing a pleading in the nature of a petition for rule making pursuant to Commission rule 1.420(i). The petition would then be examined, like all other petitions, pursuant to the Commission's policies and priorities under Section 307(b) of the Act.

23. *Other Matters*. Sinclair raises two scenarios that could arise under Section 1.420(i) which we believe should be addressed. In the first scenario, two licensees in a community each file a petition for rule making seeking to remove their stations from the community, each citing the other as the remaining local service. In such a situation, we believe the petitions should be treated in the same manner as any set of conflicting allotment petitions. Generally, conflicting petitions are either combined and considered in a *Notice of Proposed Rule Making* or, if filed on or before the applicable "cut-off" date, the later filed petition is treated as a counterproposal to or expression of interest in the earlier petition. In either event, petitions would then be examined pursuant to the Commission's policies and priorities under Section 307(b) of the Act. Second, AM and FM licensees in the same community might request a change in community of license, and the public interest may be best served by the retention of one of the stations in the community. In this situation, we believe the request of the AM licensee should generally be preferred over that of the FM licensee, provided that the AM licensee's request is filed prior to the expiration of the comment period for the *Notice of Proposed Rule Making* proposing the FM licensee's request. This preference reflects our goal of proceeding as rapidly as possible to enhance the quality of AM broadcasting. *See Report and Order* in MM Docket No. 89-46, 5 FCC Rcd 4492 (1990); *Notice of Proposed Rule Making* in MM Docket No. 90-136, 5 FCC Rcd 4381 (1990).

24. Accordingly, IT IS ORDERED, That the petition for reconsideration of the National Association of Broadcasters IS GRANTED to the extent indicated herein, and is in all other respects DENIED.

25. IT IS FURTHER ORDERED, That the petition for reconsideration of Sinclair TeleCable, Inc., IS GRANTED to the extent indicated herein, and is in all other respects DENIED.

26. IT IS FURTHER ORDERED, That the petition for reconsideration of Harron Communications Corporation IS DENIED.

27. IT IS FURTHER ORDERED, That the petition for reconsideration of Tri-Valley Broadcasting Corporation IS DISMISSED.

28. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Commission rule 1.420(i) states:

> In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

[2] Tri-Valley Broadcasting Corporation filed an untimely petition for reconsideration. Accordingly, we will dismiss this petition.

[3] The NAB, WGN of California, Inc., and a group of three licensees of stations in Atlanta, Georgia, filed motions to accept late-filed supplements and supplements. These pleadings underscore NAB's concern that the procedure adopted in the *R & O* allows the migration of stations from rural to urban areas. The NAB, the Atlanta licensees, and WGN point to specific pending cases as examples of how the rule could facilitate migration from rural to urban areas. Although we have reviewed these pleadings, in fairness to the parties to such cases, parties should not be required to litigate the specific facts of their cases in two fora. Accordingly, we do not address those specific cases herein, nor rely on those pleadings. Finally, insofar as we have granted the NAB's petition for reconsideration, further consideration of the supplements is not required.

[4] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). The television allotment priorities are (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *See Sixth Report and Order*, 41 FCC 148, 167 (1952). In some instances, we have applied the television priorities in a more flexible fashion than the FM

priorities due to the recognition that television is a more regional service. *See, e. g., Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *aff'd* 732 F.2d 962 (D.C. Cir. 1984).

[5] NAB submitted a similar proposal in comments filed in response to the *Notice of Proposed Rule Making* in MM Docket No. 89-46, 4 FCC Rcd 2430 (1989), a proceeding exploring policies to encourage interference reduction between AM broadcast stations. *See* NAB Comments in MM Docket No. 89-46, filed June 7, 1989, at 12.

[6] *See* 47 C.F.R. §§ 73.207, 73.610.

[7] *See* 47 C.F.R. § 73.1125. The main studio rule permits an AM, FM or television licensee to relocate its main studio from one point to another within the principal community contour without specific authorization from the Commission.

[8] The "15-mile" rule, formerly at 47 C.F.R. § 73.607(b) (1982), permitted an applicant for a vacant television allotment to specify as the community of license for that allotment a community within fifteen miles of the community listed in the Television Table of Allotments without requiring the applicant to petition for an amendment to the Table. Commission rule 73.203(b), 47 C.F.R. § 73.203(b) (1982), provided a similar procedure for FM radio applicants. These rules were deleted in *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984). As a result, if a licensee seeks to designate as its community of license any community other than the community listed in the Tables of Allotments, the licensee must initiate a rule making proceeding to reallot that channel to the requested community.

[9] Harron proposes that the following italicized language be added to 47 C.F.R. § 73.3572(a)(1):

> (1) * * * A major change for TV broadcast station authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§ 73.606), *except that a change in community of license to the community specified in the Table of Allotments of a channel presently assigned to an unlisted community pursuant to former § 73.607(b) (the "15-mile" rule), shall not be deemed a major change.* * *

[10] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

[11] *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988); *New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951). Although we express no opinion at this time concerning the staff's application of these precedents to any specific factual situation, we note that the staff has not hesitated to look beyond a claim of first local service in connection with requests to change community of license.

[12] *See National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).

[13] *Id., quoting Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[14] In *RKO (KFRC)*, and in a predecessor case, *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), we clarified the type of evidence we would consider in determining whether a suburban community should be denied a first local service preference. We rely primarily on three criteria to determine if a preference is unwarranted. First, we examine "signal population coverage," or, in other words, the degree to which the proposed station could provide service not only to the suburban community, but to the adjacent metropolis. Second, we examine the size of the suburban community relative to the adjacent city, its proximity to the city, and whether the suburban community is within the Urbanized Area of the city. Third, we examine the interdependence of the suburban community with the central city, looking at a wide range of evidence concerning work patterns, media services, opinions of suburban residents, community institutions, and community services. *See* 5 FCC Rcd at 3223. If a suburban station could provide service to the metropolis, and if the suburban community is relatively small, is within the Urbanized Area, and exhibits a high degree of interdependence with the metropolis, we are generally disinclined to grant a first local service preference to the suburban community proposal.

[15] *Cf. KTVO, Inc.*, 57 RR 2d 648 (1984).

[16] We do not intend this clarification, however, to in any way alter our definitions of "existing service" as used in other contexts, such as FM and TV allotment proceedings not involving Section 1.420(i), or hearings in connection with applications. In those contexts, we have for some purposes considered vacant allotments or unconstructed permits "existing service." *See, e.g., Third Report and Order (Roanoke Rapids, North Carolina)*, 9 FCC 2d 672 (1967) (allotments); *Santee Cooper Broadcasting Company*, 99 FCC 2d 781 (Rev. Bd. 1984) (construction permits), *recon. denied*, 100 FCC 2d 469 (Rev. Bd. 1985), *mod. on review*, 59 RR 2d 730 (1986).

[17] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

[18] *Id.*

[19] *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990).

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, MM Docket No. 88-526.

I dissented from the Commission's 1989 Report & Order in this proceeding because I was convinced that the new rule would encourage some licensees to abandon their assigned communities in favor of larger urban markets. The ensuing round of applications lent some credence to this concern. As a result, I am glad that, by this action, the Commission is taking steps to ensure that changes in a community of license will truly serve our allotment priorities and will not deprive communities of local service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DELTA TELEPHONE COMPANY, INC. — AAD 90-20

Waiver of the Definition of "Study-Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1990; Released: November 29, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On June 25, 1990, Delta Telephone Company, Inc. (Delta) filed a Petition for Waiver of Part 36 of the Commission's Rules relating to the definition of "study area."[1] The definition of study area contained in Part 36, Appendix-Glossary,[2] of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Delta requests this waiver in order to change its study area in conjunction with the acquisition of Sherwood Telephone Company (Sherwood). We grant this waiver.

II. SUMMARY OF PETITION

2. Delta indicates that it serves 3,607 subscribers and Sherwood serves 335 subscribers in the state of Mississippi. It states that it does not currently receive Universal Service Fund (USF) support, while Sherwood received $468 in USF support for 1989. Consequently, it concludes that the acquisition "would not skew high cost support in Delta's favor." [3]

3. According to Delta, customers of Delta and Sherwood will benefit from savings on cost studies, system audits, network integration and general administration. Thus, it claims that its waiver request "is in the public interest as it will result in cost savings, improved service quality and administrative efficiency."[4]

III. DISCUSSION

4. We have considered the petitioner's arguments and conclude that Delta should be allowed to reconfigure its study area boundaries to reflect its acquisition of Sherwood Telephone Company. The Commission's two primary concerns in study area boundary change petitions are: (1) that the change does not have an adverse impact on the high cost support program[5] and (2) that the state commission(s) having regulatory authority have been given adequate notice that they do not have justified problems with the change.[6]

5. In this case, Sherwood received a minimal amount of high cost support funds and Delta received no high cost support for 1989. Certainly, the merging of these two carriers cannot have a substantial impact on the high cost support program.

6. Delta sought and received permission from the Mississippi Public Service Commission (MPSC) to acquire Sherwood. Moreover, the MPSC did not oppose the waiver request when we sought comment on the Delta waiver. We believe, therefore, that the MPSC has had sufficient opportunity to note any objections it may have to the Delta request. In view of the foregoing, we find that this acquisition does not conflict with the intent of the Commission in freezing study areas boundaries. Accordingly, we waive the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That Delta's petition for waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] By *Public Notice* released July 17, 1990, 5 FCC Rcd 4525, we invited comments on Delta's petition. On August 1, and August 3, 1990, respectively, United States Telephone Association (USTA) and National Telephone Cooperative Association (NTCA) filed comments in support of the waiver. No other comments were received.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] Delta Petition at 4.

[4] *Id.* at 1 - 2.

[5] The Commission adopted the requirement that study area boundaries be frozen to prohibit companies from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 1984) (*Joint Board Order*).

[6] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, FCC 90-306 (October 10, 1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN
TELEPHONE &
TELEGRAPH
COMPANY

Application for authority to construct and operate a transmit/receive multipurpose earth station at Wake Island for the provision of international services.	File No. CSG-90-096-P/L
Application for authority to construct and operate a transmit/receive multipurpose earth station at Midway Island for the provision of international services.	File No. CSG-90-097-P/L

ORDER AND AUTHORIZATION

Adopted: November 20, 1990; Released: November 29, 1990

By the Chief, International Facilities Division:

1. The captioned applications, filed on July 27, 1990, by American Telephone and Telegraph Company (AT&T), request authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate transmit/receive multipurpose earth stations at Wake and Midway Islands for the provision of direct international services between the U.S., on the one hand, and Wake and Midway Islands on the other hand, and beyond. The proposed earth stations would be used for the provision of INTELSAT services to replace the services which are presently carried over the 25-year old Transpacific cable (TPC-1). In support of its request, AT&T states that the Transpacific cable (TPC-1) has been in place for 25 years and that service is rapidly degrading on the cable, and, if an outage occurs, restoration of this facility can not be implemented in a timely manner. The applications were placed on public notice on August 8, 1990. No comments were received.

2. The proposed Wake Island satellite earth station will consist of a 9.0-meter antenna and the proposed Midway Island satellite earth station will consist of a 9.2-meter antenna. Both antennas shall comply with INTELSAT Standard F-3 technical parameters and communicate with INTELSAT Pacific Ocean Region (POR) satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band.

3. In its Report and Order in the Earth Station Ownership Proceeding, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. Upon consideration of the applications we conclude that authorization of the requested services and facilities would serve the public interest. AT&T's legal, technical and financial qualifications to construct and operate the proposed multipurpose international satellite earth stations are well-established. [3] In its applications, AT&T notes that the construction of each earth station is a "major action" under Section 1.1307 of the Commissions's Rules and Regulations and therefore Environmental Assessments are required. AT&T included Environmental Assessments as Exhibit 6 to each of its applications. In letters of September 7, 1990, which granted waivers of Section 319(d) of the Communications Act of 1934, as amended, to construct the earth stations (*see* TAO-1672 and TAO-1673), the FCC determined that the construction of these earth stations shall not have a significant effect on the environment. The proposed earth stations shall comply with INTELSAT performance criteria for Standard F-3 stations. AT&T has also completed

the necessary frequency coordination. The stations will be used to provide direct service to Wake and Midway Islands. This will result in more and better service and thus will justify the construction of the multipurpose earth stations.

6. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-096-P/L and CSG-90-097-P/L ARE GRANTED, and AT&T is authorized to construct and operate the proposed earth station facilities at Wake and Midway Islands for the provision of international services[4] between the U.S., on the one hand, and Wake and Midway Islands, on the other hand, and beyond.

7. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] American Telephone & Telegraph Co., (File No. CSG-86-062-P/L), Mimeo No. 6841 (released September 11, 1986); American Telephone & Telegraph Co., (File No. CSG-85-055-P/L), Mimeo No. 7135 (released September 19, 1985); American Telephone & Telegraph Co., et al., (File Nos. CSG-86-013-P/L and CSG-86-014-P/L, Mimeo No. 3327 (released March 25, 1986).

[4] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alascom, Inc. Transmittal No. 620

Revisions to Tariff F.C.C. No. 10

ORDER

Adopted: November 20, 1990; Released: November 20, 1990

By the Chief, Common Carrier Bureau:

1. On August 24, 1990, Alascom filed Transmittal No. 620 to reduce its rates for calls originating in Alaska and terminating in Canada. This transmittal would reduce those rates by 10 to 44.7 percent, depending on the rate band of the originating call. The rates for the longest four rate bands would be reduced to the same level so that calls of distances greater than 800 miles would be rated in an identical manner. Rates for all other bands would be reduced by 10 percent. A petition to reject, or to suspend and investigate, the tariff was filed by General Communication, Inc. (GCI) on September 10. Alascom's reply, filed September 13, maintains that the proposed decrease is cost justified. The tariff revisions are scheduled to become effective November 22, 1990.

2. GCI protests Alascom's filing as unlawful. GCI Petition at 1. GCI states that Alascom and GCI are the only facilities-based satellite common carriers in Alaska that provide message, toll, and other interexchange services between Alaska and other "intra- and inter-national locations." *Id.* at 2. GCI asserts that Alascom is classified as a "dominant" interexchange carrier whose domestic rates and services are subject to the Commission's "rate integration policy" whereby Alascom's MTS and WATS rates must mirror AT&T's rates. *Id.* As a result of this policy, GCI asserts, Alascom's domestic MTS and WATS rates are below the cost of providing the service. *Id.* at 3. GCI charges that the rates in this transmittal are "far below cost, predatory, and unlawful." *Id.* at 4.

3. GCI further asserts that the international services, including those to Canada, are not subject to the rate integration policy and Alascom must account for its own costs and revenues. *Id.* GCI estimates that after Alascom's average 27 percent rate reduction, the post-reduction loss to Alascom on Canadian services would rise from current annual losses of $230,145 to "at least $504,795." *Id.* GCI claims that these losses, if accompanied by Alascom's estimate of increased traffic, would ultimately cause, at a minimum, local exchange carrier access charges to increase by at least 20 percent. *Id.* Noting that Alascom provides no estimate of cost changes as a result of this filing, GCI questions the conclusory nature of Alascom's figures in Transmittal 620. *Id.*

4. Since expenses associated with its Alaska-Canada service declined in 1989 by $427,896, Alascom reasons that a rate reduction resulting in a corresponding revenue decrease of $274,650 is justified. Alascom Reply at 1. Alascom states that GCI's contention that the 1989 Alaska-Canada service losses would be exacerbated by the proposed rate reductions is incorrect. *Id.* Alascom contends that GCI erred in its calculations by not including revenues earned by Alascom for Canadian traffic terminating in Alaska, including settlements. *Id.* at 2. Alascom provides amended figures that account for revenues earned from both Alaska-Canada and Canada-Alaska traffic, arguing that a total picture of Alaska-Canada traffic shows profitability. *Id.*

5. In this regard, Alascom contends that the correct comparison for 1989, including originating and terminating minutes, is total revenues of $4,081,662 to total expenses of $2,257,626. *Id.* If the decrease were permitted, Alascom estimates that revenues at the end of the year would be $3,807,012 and expenses at the end of the year would be $2,328,495. It submits that anticipated expenses and projected traffic volume increases due to the decreased price justify the proposed reductions, i.e., that anticipated revenues will cover the relevant costs. *Id.* at 3.

6. The Common Carrier Bureau has reviewed Alascom's Transmittal No. 620, GCI's pleading, Alascom's reply, and supplemental cost information submitted by Alascom. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate Alascom, Inc. Tariff F.C.C. No. 10, Transmittal No. 620, filed by General Communication, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DICKEYVILLE TELEPHONE CORP. — File No. I-T-C-90-145

Application for authority to operate as an international resale carrier.

TELECONCEPTS OF NEW MEXICO, INC. — File No. I-T-C-90-147

Application for authority to operate as an international resale carrier.

NORTHWEST TELECOM, LTD — File No. I-T-C-90-149

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 20, 1990; Released: November 29, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications filed by Dickeyville Telephone Corp. (Dickeyville), TeleConcepts of New Mexico, Inc. (TCNM), and Northwest Telecom, Ltd. (NWT), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on July 18, 1990. No comments were received.

2. The applicants are non-dominant domestic resale common carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Dickeyville, TCNM, and NWT.

4. Accordingly, IT IS ORDERED that application File Nos. I-T-C-90-145, I-T-C-90-147, and I-T-C-90-149 ARE GRANTED, and

a. Dickeyville is authorized to provide international switched voice services by the resale of the international switched voice services set forth in Schneider Communications, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff; and

b. TCNM, and NWT are authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 13, 1990

Released: November 29, 1990

Mr. Kevin Cooney 8310-TD/MD
Vice President C7-397
KIRO, Inc.
Station KSEA(FM)
Box C21326
2807 Third Avenue
Seattle, WA 98111-1010

Dear Mr. Cooney:

This is in further reference to our June 14, 1990, inquiry on behalf of Patricia McBride-Nelson, who filed a complaint regarding a duplicate entry exclusion in KSEA(FM)'s "4-in-a-row" contest conducted from March 30, 1990, to May 14, 1990.

The complainant says she first heard the contest promoted on KSEA(FM) on March 30, 1990, with "complete rules" to be announced the following day. She says the purported "complete rules" broadcast on March 31 and throughout the following week included an "enter as often as you like" announcement, but no statement that duplicate entries were prohibited or that written rules containing further restrictions were available at the station. According to the complainant, when she inquired on April 3, 1990, about the possibility of submitting duplicate entries, a KSEA employee told her, "The only thing you can't do is photocopy or fax them." She therefore concluded that she could handwrite or type duplicative entries. The complainant says that, wishing to confirm her interpretation of this aspect of the rules once more, she asked a station employee on April 5 whether her entries were acceptable and was told, "You're the one with the yellow envelopes. Yes, they're fine." The complainant states that on April 9, after delivering over 800 entries to the station, she first heard the "No Duplicate Entries, Please" announcement in regard to this contest. As a result, her numerous duplicate entries were eliminated from the drawings.

In your July 19, 1990, response to our inquiry, you state that "the prohibition on duplicate entries was in place on March 30, 1990, when the contest was initiated." You state that the announcement of this restriction may not have been broadcast, however, until April 8, 1990, after KSEA's receipt of multiple duplicate entries over the weekend of April 7, 1990. You admit that prior to this time KSEA's invitation for listeners to enter as often as they liked may have caused some confusion, but claim that your intent all along was to accept entries from any eligible participant for an unlimited number of "4-in-a-row" segments, aired at least three times an hour throughout the day--not unlimited duplicate entries from the same participant regarding the same music segment. You state your belief that station personnel knew this rule and correctly advised the complainant and other listeners who called to inquire about it, but you "recognize that an unfortunate misunderstanding may have occurred," and have offered to reimburse the complainant for her wasted participation expenses.

Section 73.1216 of the Commission's rules, requiring a broadcast licensee to "fully and accurately disclose the material terms" of a contest it conducts, defines "material terms," Note 1(b), as "those factors which define the operation of the contest and which affect participation therein," including "how to enter or participate" and "eligibility restrictions." The licensee's obligation to disclose the material terms of a contest "arises at the time the audience is first told how to enter or participate." Disclosure is to be made by "a reasonable number of announcements," which may be supplemented by nonbroadcast disclosure. Note 2.

In this situation, especially when listeners have been urged to enter the contest as often as they like, we believe that the duplicate entry exclusion must be considered a material term of the contest. Thus, it appears that KSEA(FM) failed to disclose in broadcast announcements at the commencement of the subject promotion and in a reasonable number of announcements from March 30 through April 7, 1990, that duplicate entries would not be acceptable. Moreover, since your earlier version of this same contest in November 1989 freely allowed duplicate entries, we believe it would have been reasonable to anticipate that listeners would, in the absence of announcements to the contrary, assume that duplicate entries were allowed once again.

Accordingly, the staff finds that KSEA(FM) repeatedly violated Section 73.1216 of the Commission's rules between March 30 and May 14, 1990, by failing to "fully and accurately disclose the material terms" of its "4-in-a-row" contest and to "conduct the contest substantially as announced or advertised." In view of all of the circumstances, however, including your offer of compensation to the complainant and your steps to assure full disclosure regarding future contests, we will close this matter with an ADMONITION which will be a part of the KSEA(FM)'s permanent record.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 13, 1990

Released: November 29, 1990

Dr. William G. Suratt 8310-TD/MD
General Manager C3-333
Kosciusko Educational Broadcasting Foundation
Radio Station WJTA(FM)
Hwy. 12 East, P.O. Box 742
Kosciusko, MS 39090

Dear Dr. Suratt:

This is in further reference to the Commission's February 23, 1990, letter of inquiry regarding WJTA(FM) donor and underwriting announcements on behalf of Hilltop Furniture, Bill Munroe Company, and Frontier Ford Lincoln Mercury (see attached transcripts of January 22 and 23, 1990, broadcasts), in possible violation of Section 73.503(d) of our Rules.

In your March 6, 1990, response, you admit that the subject announcements, and similar announcements, aired at various times from about January 5 until February 27, the day that you received our letter and its enclosures explaining the rules applicable to noncommercial broadcast stations. You state that prior to that time you had no knowledge of our rules and policies governing underwriting announcements, other than the prohibition on quoting prices (a practice you claim to have avoided). You had previously patterned your donor and underwriting announcements, you state, on those broadcast by WFCA(FM), French Camp, MS, in the erroneous belief that that station was noncommercial also. You state that you took immediate steps to comply with our rules after receiving our letter, and that underwriting announcements now state only that "the following program is made possible by (underwriter name and location)."

In view of the above, it appears that WJTA(FM), Kosciusko, MS, violated Section 399B of the Communications Act of 1934, as amended, Section 73.503(d) of the Commission's rules, and related policies prohibiting the broadcast of "advertisements" by noncommercial educational stations. Accordingly, WJTA(FM) is admonished for such violations, and this matter is being made a part of the station's permanent records. You are cautioned that future violations may result in more severe sanctions, including monetary forfeitures.

Regarding your request for information on converting to a "commercial educational station," we must advise you that certain frequencies are reserved for noncommercial use only, including the one on which WJTA(FM) broadcasts. If you wish to apply for a non-reserved frequency available for commercial use, you must follow the Commission's formal allocation and application procedures.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

ATTACHMENT

WJTA(FM) Underwriting Announcements
Aired Jan. 22-23, 1990

Want to know what the best kept secret in Ottawa County is? That's Hilltop Furniture and Grocery. Stop by and see their beautiful selection of living room suites, bedroom suites, dining room suites, recliners and cabinets . . . everything you need to fill every room in your house. That's Hilltop Furniture and Grocery on the hilltop, Highway 12, Ethel.

Are you looking for a new vacuum cleaner? Why not stop by or call the Bill Munroe Company today for a home demonstration on the new Majestic Filter Queen, the clean air machine. We service what we sell. That's the Bill Munroe Company, located at 630 Highway 12 East in Kosciusko. Or give 'em a call at 289-2566.

Has the cold winter weather got your car down? In the market for a new or late model car or truck? Frontier Ford Lincoln Mercury in Carthage has a complete line of new and late model cars and Ford pickup trucks. They also have a large selection of factory executive lease cars. They don't use high pressure sales tactics or gimmicks. They just give you honest, down-to-earth prices with courteous, dependable service. They have special, low-rate financing and dealer discounts and factory special value discount option packages. They have an overstocked inventory with over 100 new and late model cars and pickup trucks. That gives you the best possible selection to choose from. So stop by and talk to the friendly folks at Frontier Ford Lincoln Mercury today. Treat yourself to service with a smile. That's Frontier Ford Lincoln Mercury, Highway 35 South, Carthage.

Is your vacuum cleaner dying a slow, painful death? Do your vacuum cleaner and yourself a favor. Take it down to the vacuum cleaner hospital for all your vacuum cleaner needs. Service and repair, bags, belts and parts. That's the Bill Munroe Company, the vacuum cleaner hospital. Located at 630 Highway 12 East in Kosciusko.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: November 29, 1990

CONTEL CORPORATION FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On November 13, 1990, Contel Corporation filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. Parties may file comments on the proposed revisions to the cost manual no later than **December 26, 1990.** Replies should be filed by **January 10, 1991.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-585

In the Matter of

Amendment of Section 73.202(b), RM-7338
Table of Allotments,
FM Broadcast Stations.
(St. Marys, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Sunrise Broadcasting Corp. ("petitioner"), requesting the allotment of FM Channel 275C2 to St. Marys, Kansas, as that community's first local broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 275C2 can be allotted to St. Marys, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction of 24.3 kilometers (15 miles) east of the community.[1] The site restriction will prevent conflicts with Station KFRX, Channel 274C, Lincoln, Nebraska, Station KHUT, Channel 275C1, Hutchinson, Kansas, Station KNDY-FM, Channel 276C3, Marysville, Kansas, and a proposal to substitute Channel 278C2 for Channel 278A at Ogden, Kansas.

3. In view of the fact that the proposed allotment could provide a first local broadcast service to St. Marys, Kansas, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
St. Marys, Kansas	---	275C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Howard J. Braun
Shelley Sadowsky
Rosenman & Colin
1300 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 275C2 are 39-05-47 and 95-48-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-389

In the Matter of

Amendment of Section 73.202(b), RM-7339
Table of Allotments,
FM Broadcast Stations.
(Monticello, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1990; Released: November 29, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Markey Broadcasting Co., Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5378 (1990), proposing the allotment of Channel 259A to Monticello, New York, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for Channel 259A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 259A to Monticello, New York, since an interest has been expressed in providing the community with its second local FM service. Channel 259A can be allotted to Monticello in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.9 kilometers (1.8 miles) west to avoid a short-spacing to Station WWWK, Channel 257A, Ellenville, New York.[1] Canadian concurrence in the allotment has been received since Monticello is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 14, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Monticello, New York	252A, 259A

4. The window period for filing applications will open on **January 15, 1991,** and close on **February 14, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 259A at Monticello are North Latitude 41-39-09 and West Longitude 74-43-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Tariff F.C.C. No. 68 — Transmittal Nos. 2010 and 2043

ORDER

Adopted: November 21, 1990; Released: November 21, 1990

By the Chief, Common Carrier Bureau:

1. Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2010 to establish Individual Case Basis (ICB) rates for two DS1B services, without protection, between two premises of American Telephone and Telegraph Company (AT&T) in Houston, Texas.[1] The DS1B interface would accommodate an AT&T customer that wishes to transmit data between its London, England, office and its office in Houston, Texas. The AT&T customer's London office computer operates on a standard European 2.048 Mbps interface, which is incompatible with the 1.544 Mbps service used in this country and currently offered by SWB. Therefore, according to SWB, the proposed interconnection to the Houston office is necessary for uniformity with that customer's existing system. Transmittal 2010, Section 12.2.(2). Transmittal 2010 is scheduled to become effective on November 21, 1990.

2. A petition to reject, or alternatively, suspend and investigate Transmittal 2010 was filed on August 7, 1990, by Metropolitan Fiber Systems, Inc. (MFS).[2] In that petition, MFS argues that the fact that SWB based the proposed monthly rates on costs, as well as on market factors such as customer willingness to pay, directly contravenes the *Strategic Pricing Reconsideration Order*, 5 FCC Rcd 400, 408 (1990), which established that local exchange carrier (LEC) rates for DS1 service were to be based on cost. Additionally, MFS contends, in the *ICB Order*, 4 FCC Rcd 8634 (1989), the Commission proscribed ICB pricing for DS3 and DS3-equivalent services (with the exception of dark fiber services offered by LECs). *Id.* at 3. MFS also contends that in the *ICB Reconsideration Order*, 5 FCC Rcd 4842 (1990), the Commission found that ICB ratemaking for DS3 and DS3-equivalent services is unreasonably discriminatory because the LECs have sufficient experience in providing such services to establish averaged rate schedules. Moreover, MFS argues, the Commission explicitly stated that the conclusion in the *ICB Order* that LECs must justify all departures from general rates is not limited to DS3 service or DS3-equivalent service. *Id.* at 3-4. Finally, MFS concludes that SWB's cost data are inadequate to provide any justification for the proposed rate service and therefore fails to comply with Section 61.38 of the Commission's Rules. *Id.* at 4.

3. SWB replies that DS1B service is not the functional equivalent of DS1, DS1C, DS3 or any other SWB special access service to which the above Orders pertain. SWB Reply at 3. SWB also states that in the *ICB Order* the Commission authorized the use of ICB rates for new service offerings until a LEC gained sufficient experience to develop general rates. SWB maintains that it has never provided this service before and has no other requests for DS1B service other than the present case. Since SWB has no prior experience with DS1B service from which to determine averaged rates, SWB contends that costs and rates for each service must be individually developed until it has enough data to generate averaged schedules. *Id.* at 4-5.

4. The Common Carrier Bureau has reviewed the SWB transmittal and the related pleadings. We conclude that an investigation of this transmittal is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition filed by Metropolitan Fiber Systems, Inc., against Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 2010, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] On October 30, 1990, SWB was granted special permission to file Transmittal No. 2043 (Special Permission No. 90-1156). Transmittal 2043, filed November 15, 1990, clarifies Transmittal 2010 by further explaining how termination charges are calculated if a subscriber cancels service prior to the end of the service expiration date.

[2] By letter dated August 15, 1990, MFS withdrew its initial request that the Commission reject, or alternatively suspend and investigate, Transmittal 2010 and instead requests that the Commission suspend Transmittal 2010 for one day, and permit it to take effect subject to an investigation and an accounting order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Belwen, Inc. File No. 1537-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the E-group channels
at Anderson, Indiana

ORDER ON RECONSIDERATION

Adopted: November 21, 1990; Released: November 29, 1990

By the Chief, Common Carrier Bureau:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Belwen, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Anderson, Indiana and for reinstatement of the application.

I. BACKGROUND AND CONTENTIONS

2. As the result of a lottery held on September 29, 1986, Belwen's application was selected for qualification review. Subsequently, the Division's staff conducted such a qualification review of this application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, this application was found to contain several deficiencies that precluded the staff from making a finding that Belwen was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated October 17, 1986, Belwen was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter. In this deficiency letter, Belwen was also advised that failure to file the requested information within thirty days of October 17, 1986 could result in the dismissal of its application.

3. By letters dated November 17 and 18, 1986, and January 28, 1987, Belwen provided some of the information necessary to complete processing of its application. Belwen did not submit the requested signed lease or option agreement, a current financial qualification demonstration, or the non-interference analysis.

4. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 21.13(c), 21.20(d), and 21.28(d), and by letter dated August 4, 1988, the Division dismissed, without prejudice, Belwen's application for failure to comply in a timely manner with the Division's request for information.

5. On October 3, 1988, Belwen submitted a petition for reconsideration of the Division's dismissal action. Belwen maintained that reinstatement of the application would be in the public interest because: (1) Belwen should not have been requested to submit *current* financial qualification information in 1986, because it had submitted financial information in 1983; (2) Belwen should not have been requested in 1986 to submit a lease or option as concrete evidence of site availability because the Commission should only require a statement by the applicant's agent that a telephone inquiry in 1983 had determined that there was space available at an unspecified site in Anderson at that time; and (3) Belwen should not have been requested to submit an "expensive, time-consuming and premature" non-interference analysis to comply with the requirements of 47 C.F.R. § 21.902(i). Belwen also claimed that prior to dismissal Division staff should have written another letter to it, warning that if it did not submit the requested information Belwen's application would be dimissed.

II. DISCUSSION

6. As of the date of the Division's dismissal action, August 4, 1988, and almost twenty-two (22) months after the Division's request for information, Belwen still had not submitted the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Belwen had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 47 C.F.R. § 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*). Thus, Belwen's agent's statement in 1983 that there was space available at some unspecified location in Anderson was inadequate post-lottery as "concrete evidence" of the availability of its proposed transmitter site.[3]

7. In addition, Belwen failed to submit the required current financial qualification information prior to dismissal.[4] Also, Belwen failed to comply with the request to submit a Section 21.902(i) non-interference analysis. Section 21.902(i) requires MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by November 17, 1986, Belwen failed to submit the required analysis until May 23, 1989.[5] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

8. Belwen had a duty to submit curative amendments to its application within thirty days of October 17, 1986, or to seek an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit cura-

tive amendments for more than two and one-half years substantially impeded the expeditious offering of MMDS at Anderson. Also, Belwen's failure to respond in a timely fashion to the Division's information requests hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act.

> The Communications Act manifests a [C]ongressional view that the FCC must have full access to relevant information. . . . The statutory plan is not for carriers to determine what information is to be furnished and when. It is for this Commission to do so. The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities.

By Direction of the Commission Letter to US West, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal and again as of the deadline for filing a petition for reconsideration, Belwen had not provided the Section 21.902(i) non-interference analysis, the required financial certification, and the required lease or option agreement. The staff therefore was not in a position to complete evaluation of Belwen's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi - Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990). In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Belwen, Inc. regarding its Anderson, Indiana MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. § 21.15(a); (2) correct antenna structure height information, pursuant to 47 C.F.R. §§ 21.15(c) and (d); (3) an adequate topographic map, pursuant to 47 C.F.R. § 21.15(h); (4) current financial data, pursuant to 47 C.F.R. § 21.17(b); (5) the agreement with a non-applicant regarding control of the station pursuant to FCC Form 435 item 25(b) and 47 C.F.R. § 21.15(f); (6) a non-affiliation statement, pursuant to 47 C.F.R. § 21.900; (7) required tariff information, pursuant to FCC Form 435 item 29 and 47 C.F.R. § 21.304; and (8) a 47 C.F.R. § 21.902(i) non-interference analysis.

[2] Section 21.15(a) provides *inter alia* : "Applicants proposing a new station location . . . shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease. . . . " Belwen presents no argument as to why it should be exempted from "ordinary circumstances" treatment, which would require by the terms of this rule provision that a lease or written option to buy or lease be submitted. In addition, even if Belwen was not required to comply with the requirements of Section 21.15(a), Belwen was required pursuant to Section 21.13(c) to submit a lease or option agreement after Division staff stated in the October 17, 1986 letter that a lease or option agreement was required for qualification review purposes and requested Belwen to submit it. Section 21.13(c) provides *inter alia* : "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) As the Commission, at any time after the filing of an application . . . may require from any applicant . . . to enable it to determine whether a radio authorization should be granted . . . ."

[3] In its petition for reconsideration, Belwen stated that it intended to submit an option to lease at some unspecified future date. On February 2, 1989, approximately two and one-third years after the information was requested, Belwen submitted an option to lease; however, the option was for a site different from the one proposed in Belwen's application.

[4] Belwen submitted a financial certification with its petition for reconsideration, almost twenty-two months after updated financial information was requested. Belwen provides no support for its claim that *current* financial qualification information did not need to be submitted upon request by the Division staff. At that time, Section 21.17(b) specified that a balance sheet must be current within ninety (90) days. *See also* Section 1.65. In addition, even if Belwen were not required to comply with the requirements of Section 21.17(b) as to providing qualification information that was current within ninety days, Belwen was required pursuant to Section 21.13(c) to submit *current* financial qualification information after the Division staff stated in the October 17, 1986 letter that *current* information was required for qualification review purposes and requested Belwen to submit it.

[5] In its petition for reconsideration, Belwen stated that it intended to submit a non-interference analysis at some unspecified future date. As a supplement to its petition for reconsideration, Belwen submitted on May 23, 1989, more than two and one-half years after the information was requested, an interference analysis pursuant to 47 C.F.R. § 21.902(i), together with an amendment of its technical proposal necessary to reduce the potential for harmful interference to Instructional Television Fixed Service (ITFS) stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

AMERICAN COMMUNICATIONS NETWORK, INC. File No. 63500-91-01-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KNKB659 in the Public Land Mobile Service at Jessup, Georgia, Jacksonville, Florida, and Brunswick, Georgia

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

ORDER

Adopted: November 20, 1990; Released: November 29, 1990

By the Chief, Mobile Services Division:

1. On October 9, 1990, the Mobile Services Division issued a Notice of Apparent Liability for Forfeiture (*NALF*) to American Communications Network, Inc. (American), finding that an apparent violation of Section 22.9 of the Commission's rules had occurred for operating Station KNKB659 at Jessup, Georgia, Jacksonville, Florida, and Brunswick, Georgia, in an unauthorized manner, and assessed a forfeiture in the amount of $2,360.00.

2. American has taken no action in response to the *NALF*, and the $2,360.00 forfeiture has remained unpaid. As a result, American is hereby ordered to pay $2,360.00

ORDERING PARAGRAPHS

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that American Communications Network, Inc. FORFEIT to the United States the sum of Two Thousand Three Hundred Sixty Dollars ($2,360.00) for the violation of Section 22.9 of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

4. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to American Communications Network, Inc. by Certified Mail, Return Receipt Requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies — Transmittal No. 468

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: November 21, 1990; Released: November 23, 1990

By the Chief, Common Carrier Bureau:

1. On August 27, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 468 to, *inter alia*, reduce their local distribution channel (LDC) rates for OPTINET DS1 – a digital service operating at 1.544 Mbps. According to Ameritech, the rate reduction, which Ameritech claims will bring OPTINET DS1 rates closer to the fully distributed costs (FDC) of providing the service, will result in a decrease in revenue of approximately $8.4 million on an annual basis. Ameritech also states that the new rates will be more uniform across Ameritech's region than the existing rates. Ameritech Transmittal 468, Description and Justification at 1-2. The Association for Local Telecommunications Services (ALTS) filed a petition on September 11, 1990, to reject or, in the alternative, suspend and investigate Transmittal 468. Ameritech filed a reply on September 19, 1990. The tariff is scheduled to take effect on November 25, 1990.

2. ALTS is concerned that Ameritech is using this rate reduction to gain an unfair advantage in the marketplace and makes two arguments to support this contention. First, the reductions are only for DS1, a service for which Ameritech faces strong competition, and not DS0 or DS3, where there is less competition. ALTS Petition at 2. Second, by only reducing LDC rates, the proposal will give a proportionately higher rate reduction to zero-mileage-based customers. According to ALTS, these customers are generally located in large metropolitan areas where Ameritech faces competition in DS1 service. *Id.* ALTS concludes that the proposed rate reduction is *de facto* geographic rate deaveraging for the purpose of combating competition in large markets while maintaining revenues in markets where competition has yet to develop. *Id.*

3. In its reply, Ameritech argues that ALTS does not present any valid arguments for denying the proposed rate reduction contained in Transmittal 468. Ameritech Opposition at 2. Ameritech denies that the proposed rate changes will give a preference to zero-mileage-based customers. Ameritech argues that since LDC charges are the one element which is common to all DS1 customers, this rate reduction will benefit all customers. *Id.* at 3. Contrary to the ALTS argument, Ameritech asserts that reductions in the LDC rates are the one type of reduction that will not give a preference to only a limited number of DS1 customers. *Id.* at 4. Ameritech also denies that it will be creating *de facto* geographic rate deaveraging by instituting the proposed rate reductions, arguing that the tariff will be actually moving towards uniform regional rates. According to Ameritech, the rates were not targeted at large metropolitan areas, but were calculated on a statewide basis for DS1 customers. *Id.* at 6.

4. The Common Carrier Bureau has reviewed Ameritech Transmittal No. 468, the ALTS petition, and Ameritech's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject filed by the Association for Local Telecommunications Services against Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 468, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-161

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Revise Certain
Filing Procedures for the Mobile
Services Division Applications and to
Eliminate Form 430

FURTHER ORDER ON RECONSIDERATION

Adopted: November 5, 1990; Released: November 28, 1990

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On July 20, 1989, the Commission released a *Memorandum Opinion and Order* (*MO & O*) [1] which resolved petitions for reconsideration and comments seeking modification of the *Report and Order* [2] that amended Part 22 of the Commission's rules to require the filing of microfiche copies of applications and pleadings filed with the Mobile Services Division (MSD). Telocator Network of America (Telocator) and Blooston, Mordkofsky, Jackson & Dickens (Blooston) filed petitions for further reconsideration. [3] This *Further Order On Reconsideration* (*Order*) resolves these petitions.

2. Among other things, the *MO & O* modified the *Report and Order* by exempting from the microfiche requirement emergency filings, such as letters requesting special temporary authority (STA). It also provided that opposition and reply pleadings could be filed initially on paper, and microfiche copies could be filed within 15 days thereafter.[4] In addition, the *MO & O* noted that Section 22.19 of the Commission's Rules provides that applicants may request waivers of the filing rules and extensions of time when emergencies arise that prevent the applicant from timely complying with the microfiche filing requirement.

3. Telocator argues that there are three reasons why the Commission should reconsider its decision that documents filed under Part 22 of the Commission's Rules be filed on microfiche. Telocator states that: first, the microfiche rules greatly increase the costs of complying with the Commission's Rules and Regulations; second, the microfiche requirement could reduce the efficiency of the MSD, and third, the new Rules unreasonably discriminate against Part 22 applicants.

4. Telocator objects to the increase in time and money that applicants will have to bear to comply with the rules. This is especially so, Telocator maintains, for those who do not have microfiching facilities readily available to them and do not want to rely on a Washington lawyer to file for them. Telocator argues that the cost of overnight mail will cause additional and significant expenses, delays and administrative complications for applicants preparing submissions to the Commission. Even companies that hope to avoid problems by purchasing their own equipment, Telocator alleges, are finding that the associated costs are much higher than they originally anticipated because the microfiching equipment can be operated only by trained personnel. Telocator also asserts that the waiver standard adopted in the *MO & O* is too stringent and virtually impossible to meet.[5]

5. Telocator alleges that the *MO & O* ignores arguments that the microfiche requirement could reduce the efficiency of the MSD. Telocator contends that the microfiching requirement will increase the burdens on Commission personnel and decrease the efficiency of the MSD reference room. It claims that this inefficiency will be caused by the increase in handling time for Commission personnel and researchers since microfiche does not allow for quick perusal of files and cannot be copied quickly. In addition, Telocator contends that Commission efficiency will be adversely affected because Commission personnel will have to be trained to operate and repair microfiche readers, printers and copiers. Telocator notes that the space saved by using microfiche could be negligible compared to the additional space needed to accommodate the equipment necessary to use and print microfiche. Furthermore, Telocator states that it will be necessary for the MSD to spend additional time and resources to deal with deficiencies stemming from improper microfiche filings.

6. Telocator also contends that the microfiche requirement imposes a burden on Part 22 applicants that is not required of other Commission applicants. Telocator notes that while it recognizes the Commission's decision to impose the microfiche requirement arose in part from the desire to reduce the space shortage in the MSD, it contends that Part 22 filings comprise a very small percentage of all the documents submitted to the Commission. Thus, Telocator states, if requiring filings on microfiche will indeed save the Commission's time, resources and space, it should be required of all applicants, or at least of those services which demand far more resources and space than Part 22 licensees. Telocator contends that the microfiche requirement imposes a singular burden on Part 22 licensees, from which competitors of Part 22 licensees are exempt. Telocator states that the Commission should explore other options that would be less burdensome to Part 22 licensees, yet still address the needs of the MSD. The FCBA agrees with Telocator and urges the Commission to revisit the microfiche requirement with a fresh look at the practical and economic impacts of the requirement.

7. In its petition, Blooston requests that the Commission allow 15 days to file microfiche copies for all Part 22 pleadings, including petitions to deny, petitions for reconsideration, applications for review and informal requests for Commission action, as well as the filings specified in Section 1.45 of the Commission's Rules.[6] Further, Blooston contends that the Commission's failure to grant the 15 day extension for petitions to deny contravenes one of the conditions of the Office of Management and Budget's (OMB) approval of the microfiche rule.[7] Blooston states that additional time is needed to file microfiche copies for initial pleadings directed against a particular filing, because the 30 day filing period is triggered by the date of public notice of the filing and often an interested party may not become aware of a filing until

as much as a week after the public notice is released. In addition, Blooston notes that time may be needed for engineering studies and other research to support a filer's position. Thus, Blooston claims, the time allotted for actual preparation of the pleading is drastically reduced as a result of the microfiche requirement.

8. NYNEX and FCBA support Blooston's argument that applicants be allowed to file microfiche copies 15 days after the paper filing for all pleadings. They contend that because the initial pleadings cover a much broader scope than the reply and opposition pleadings, the full 30 day time period is needed to prepare the filings. The additional time needed to microfiche the pleadings will reduce significantly the time to prepare petitions, they maintain. In addition, FCBA requests that the Commission allow microfiche copies for FCC Form 489 to be filed up to 15 days after the original is filed in order to prevent a delay in service to the public upon the completion of construction of a station.[8] This standard, FCBA contends, would be easy to administer and would reduce the significant burden which has been placed on applicants and licensees by the microfiche rule.

II. DISCUSSION

9. The arguments raised by Telocator are virtually identical to those raised and rejected in the *Report and Order* and the *MO & O* in this proceeding. No new arguments have been presented to persuade us that the microfiche requirement is an unreasonable burden on applicants in terms of time or money. Indeed, we note that the microfiche requirement has been in effect since September 25, 1989, and there have been no significant problems. Since applicants began filing cellular applications on microfiche, the Commission staff has become familiar with the use of microfiche equipment and no significant delays have been experienced by the public attributable to microfiche usage or storage.[9] Moreover, no evidence has been submitted that applicants for public mobile services licenses have been harmed economically by the microfiche filing requirement. Additionally, we point out that adoption of the microfiche filing requirement is a temporary solution to the immediate problems of space constraints and file integrity at the Commission. The Commission is exploring long-term solutions to these problems, such as electronic filing.

10. With respect to the institution of the microfiche requirement for filings in the MSD and not in other services, the *MO & O* explained that the MSD processing environment was particularly suited for microfiche filing, because of advances in cellular technology and growing demand for cellular and paging services, resulting in an increase in filings by parties seeking cellular and paging system authority. The significant amount of information required of MSD applicants makes it necessary for applicants to submit large amounts of paper that must be filed and stored in the MSD.[10] These circumstances are sufficient to justify imposing the microfiche requirement in the public mobile services and not in the other services at this time. Moreover, we reject Telocator's argument that the standards for waiver of the microfiche requirement are too stringent and virtually impossible to meet. The waiver standards set forth in the *MO & O* are the standards enunciated in Section 22.19 of the rules and are applicable to all waiver requests. The rules governing the microfiche filing requirement will be enforced in the same manner as any other Commission rules, and may be waived if the waiver requirements of Section 22.19 are met.[11] Therefore, we reject as speculative Telocator's assertion that our waiver standards will result in consistent denial of waiver requests.[12]

11. Moreover, we find that adoption of Blooston's, NYNEX's and FCBA's suggestion that we permit all pleadings to be filed on microfiche 15 days after the paper submission, would create a permanent dual paper and microfiche filing system[13] and an unmanageable administrative burden for the Commission.[14] Maintaining this dual system requires that (1) two locations be searched for relevant files when the public requests a file, (2) the later-filed microfiche copy be matched with the paper copy so that the paper copy can be discarded and (3) significant file space be allocated for the dual filing system.[15] Additionally, we note that although the microfiche requirement has been in effect for a significant period of time, no evidence has been presented by petitioners to support their allegation that the 30-day filing period for initial pleadings is inadequate to both prepare the pleading and comply with the microfiche requirement. Finally, we reject Blooston's contention that our failure to grant the 15-day extension for all Part 22 pleadings would contravene a condition set forth by OMB. In its February 23, 1989 letter to the Commission, OMB conditioned its approval of the microfiche filing requirement on the provision of an extended filing period for "opposition and reply pleadings (as set forth in 47 CFR 1.45), or any other filings for which the deadline is fewer than 30 days . . . ." Therefore, because the other types of pleadings to which Blooston refers, petitions to deny, petitions for reconsideration, etc., all have longer filing deadlines, they were clearly not included in OMB's condition. Moreover, while Attachment I to OMB's letter would appear to extend the additional filing period to "pleadings and petitions," *see* note 6 *supra*, the Attachment also referenced Section 1.45, which deals only with oppositions and replies and not with pleadings with longer filing deadlines. Thus, we conclude that OMB intended to permit a longer filing period only for those pleadings referenced in Section 1.45 of the Commission's Rules, *i.e.*, opposition and reply pleadings, and any other filings for which the deadline is fewer than 30 days. The Commission was given discretion to determine a reasonable period within which applicants may file the microfiche copies after the paper pleadings have been submitted, and determined that 15 days was reasonable. We have been presented with no evidence to demonstrate that this time period is inadequate.[16] Thus, we conclude that we have complied with OMB's conditions.[17]

12. Finally, as a result of our experience receiving microfiche copies since adoption of the filing requirement, we find it necessary to amend Section 22.6 of the Commission's rules to require slightly modified labelling at the top of microfiche copies to assist MSD staff in filing and locating microfiche copies for public use. Microfiche copies of applications and amendments shall be labeled with the month and year, the name of the document, the file number and call sign, if assigned (for non-cellular filings), and the market number and block (for cellular filings). Microfiche copies of pleadings shall be labeled with the month and year, the name of the document, the filing party, the file number and call sign, if assigned (for non-cellular filings) and the market number and block (for cellular filings). This information must be submitted

in addition to that already required in the rule. This modification constitutes only a minor change, should not increase the burden on the public, and should be beneficial to the public by better identifying the document contained on the microfiche. *See* Section 22.6(d)(2) which is set forth in the Appendix.

13. We also take this opportunity to clarify the application of the rules because of questions the staff has received from the public. In counting the pages of a document to determine whether the document is 5 pages or less, the cover letter of an application need not be counted. Cover letters are not required by our rules and hence are not part of the file. Therefore, our staff does not microfiche cover letters. If the filer for some reason wants the letter to be part of the file, however, the filer should provide microfiche copies with its filing. In addition, new Form 155 (the fee form) and the certificate of service must be counted. Both of these documents are required by the rules and, therefore, must be made part of the file. Also, when submitting late-filed microfiche copies (including copies of oppositions and replies submitted 15 days after the paper copies), applicants should not resubmit the paper copy of the document. The filers who do resubmit the paper filing with the late-filed microfiche have caused staff confusion because the document often is thought to be a completely new filing. Therefore, all parties filing microfiche after the paper copies are filed should send the microfiche copies with a cover letter specifically identifying the paper filing.

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING PARAGRAPHS

15. WHEREFORE, for the foregoing reasons, Part 22 of the Commission's Rules IS HEREBY AMENDED as discussed herein and as shown in the Appendix below.

16. Accordingly, IT IS ORDERED That the Petition for Further Reconsideration filed by Telocator IS DENIED.

17. IT IS FURTHER ORDERED That the Petition for Partial Reconsideration filed by Blooston, Mordkofsky, Jackson & Dickens IS DENIED.

18. IT IS FURTHER ORDERED That the rule change set forth in the Appendix shall become effective 60 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX
AMENDED RULES SECTION

Title 47, Part 22 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority for Part 22 continues to read as follows:

Authority: Sections 4 and 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. Sections 154, 303.

2. Section 22.6(d)(2) is amended to read as follows:

* * * * *

(2) Non-cellular and Non-Initial Cellular Applications. All non-cellular and non-initial cellular applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche: 1) the name of the applicant; 2) the city and state of the application; 3) the month and year of the document; 4) name of the document; 5) file number and call sign, if assigned (for non-cellular filings); and 6) the market number and block (for cellular filings). Each microfiche copy of pleadings shall include 1) the month and year of the document; 2) name of the document; 3) name of the filing party; 4) file number and call sign, if assigned (for non-cellular filings); 5) market number and block (for cellular filings). Abbreviations may be used if they are easily understood.

FOOTNOTES

[1] 4 FCC Rcd 5654 (1989).

[2] 3 FCC Rcd 6684 (1988).

[3] Comments were filed by NYNEX Mobile Communications Company (NYNEX) and the Federal Communications Bar Association, Land Mobile Practice Committee (FCBA).

[4] With exceptions, microfiche copies of "all applications, amendments, correspondence, pleadings and forms" are to be filed simultaneously with the original hard copy. 47 C.F.R. § 22.6(d).

[5] An applicant is expected to provide the Commission with specific facts to indicate the existence of unique, extraordinary, and unavoidable circumstances that prevent the applicant from submitting its microfiche copies along with the paper original. *MO & O*, 4 FCC Rcd at 5658 n. 12.

[6] Section 1.45 of the Commission's Rules provides, in pertinent part, that:

> (a) . . . Oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed.
>
> (b) . . . The person who filed the original pleading may reply to oppositions within 5 days after the time for filing oppositions has expired.

[7] Because the *Report and Order* imposed new and modified reporting requirements on applicants, it was subject to approval by OMB. OMB granted approval of the microfiche rule subject to four conditions. In its letter, OMB stated that one condition includes revising FCC rules and procedures to:

> "permit opposition and reply pleadings (as set forth in 47 CFR 1.45), or any other filings for which the deadline is fewer than 30 days, to be submitted in paper only to meet the deadline with microfiche to be submitted within a reasonable period thereafter;"

In Attachment I to the OMB approval letter that same condition is worded as follows:

> "For pleadings and petitions: 1) the paper filings of the official/original document(s) will continue to be accepted within the periods determined in the FCC rules for such documents (47 CFR 1.45); and 2) the microfiche copies of the original filings will be permitted to be filed within some reasonable period thereafter, to be determined by the FCC."

Letter from the Office of Information and Regulatory Affairs to the Federal Communications Commission (February 23, 1989).

[8] FCC Form 489 - Notification of Status of Facilities Under Part 22 of FCC Rules.

[9] There has been some confusion in the MSD public reference room surrounding the conversion of older paper files to microfiche and some misfiling of microfiche has occurred. The problems surrounding the conversion are short-lived and the conversion project will soon be complete. Misfiling of microfiche documents is the result of staff shortages in the public reference room and occurs even when paper files are used.

[10] *MO & O*, 4 FCC Rcd at 5656.

[11] For example, we stated in the *MO & O* that, "[a] person's rural or otherwise isolated or inaccessible location would be one factor together with others that might justify granting a waiver...." *MO & O*, 4 FCC Rcd at 5658 n. 12.

[12] We will not adopt the FCBA's request that Forms 489 be filed on paper with microfiche copies to follow. Normally, a company completing construction of a facility will know one to two weeks in advance when the facility will be ready for operation. This time period should be adequate to allow the licensee to prepare a Form 489 and create microfiche copies in time to be ready to file the form and copies the day the facility becomes operational.

[13] Although any particular paper filing would not need to be retained for long, the system would be permanent and ongoing.

[14] *MO & O*, 4 FCC Rcd at 5655. We note that our exemption from the microfiche filing requirements of documents of five pages or less already creates a significant burden on the staff. The staff has to microfiche these small documents, and this situation has significantly delayed updating microfiche files and application processing in some circumstances.

[15] We should also note that, after the complete conversion to microfiche, the Commission anticipates consolidating the two Mobile Services reference rooms into one and expanding the current limited hours so that the public will be better able to review files. These changes, which would not be possible without microfiche under current budget limitations, will produce clear benefits to the public by increasing their access to public reference room files.

[16] We note that the MSD staff has, heretofore, been lenient in granting waiver requests even though applicants and licensees frequently fail to include statements of reasons to justify the waiver as required by Section 22.19 of the Commission's rules. We are concerned that some parties are abusing waiver requests particularly in the legal pleading area. In numerous instances no waiver is requested at all when no microfiche is filed with the paper document. We emphasize, therefore, that, in the absence of a waiver, all parties are expected to fully comply with the microfiche filing requirement, and that applications and pleadings may be returned if microfiche copies are not attached.

[17] Contrary to the apparent conception of some petitioners herein, pleadings which are assigned docket numbers, *e.g.*, pleadings filed in Rule Making and hearing proceedings, need not be filed on microfiche. Docketed proceedings are maintained in the Dockets Public Reference Room and are paper files.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies

Petition for Waiver of Part 69 of
the Commission's Rules for Electronic
Directory Assistance Service

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1990; Released: November 27, 1990

By the Chief, Common Carrier Bureau:

1. On October 18, 1990, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish new rate elements for Electronic Directory Assistance (EDA) service. This service would permit Ameritech customers to access electronic directory listings without operator interaction or reference to printed white pages. Ameritech's EDA service would provide access to a database which customers can use to obtain telephone numbers and addresses of telephone subscribers in Ameritech's service area by entering their names. Ameritech maintains that the information available through EDA is the same as that available through operator directory assistance. Ameritech Petition at 2-3. Specifically, Ameritech says its EDA service would not have "reverse search" capability, *i.e.*, this service could not be used to determine the name and address of an individual by entering his or her telephone number. *Id.* at 3.

2. Section 1.3 of the Commission's Rules provides that waiver petitions may be granted "if good cause therefor is shown." We have previously considered an almost identical waiver request from Southwestern Bell Telephone Company (SWB). We granted SWB's request because we found that "[a]lthough electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service. A distinct charge to recover the unique costs of electronic directory assistance from only the users of that service would, therefore, be more consistent with the Commission's cost-causation policies." *Southwestern Bell Telephone Company*, 5 FCC Rcd 3792 (Com. Car. Bur. 1990). There is no material difference between Southwestern Bell's EDA service and Ameritech's EDA service. Thus, good cause exists to permit Ameritech to establish a separate rate subelement for EDA service and, therefore, we grant the waiver.

3. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company

Petition for Waiver of Part 69 of the Commission's Rules for Electronic White Pages Service

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1990; Released: November 27, 1990

By the Chief, Common Carrier Bureau:

1. On October 9, 1990, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (together, BellSouth) filed a petition for waiver of Sections 69.4(b) and 69.109 of the Commission's Rules, 47 C.F.R. §§ 69.4(b), 69.109, to establish new rate elements for Electronic White Pages (EWP) service. This service would permit BellSouth customers to access electronic directory listings without operator interaction or reference to printed white pages. BellSouth's EWP service would provide access to a database which customers can use to obtain telephone numbers and addresses of telephone subscribers in BellSouth's service area by entering their names. BellSouth maintains that the information available through EWP is the same as that available through operator directory assistance. BellSouth Petition at 2. Specifically, BellSouth says its EWP service would not have "reverse search" capability, *i.e.*, this service could not be used to determine the name and address of an individual by entering his or her telephone number. *Id.* at 2 n.3. No oppositions or comments were filed in response to BellSouth's waiver petition.

2. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that waiver petitions may be granted "if good cause therefor is shown." We have previously considered an almost identical waiver request from Southwestern Bell Telephone Company (SWB). We granted SWB's request because we found that "[a]lthough electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service. A distinct charge to recover the unique costs of electronic directory assistance from only the users of that service would, therefore, be more consistent with the Commission's cost-causation policies." *Southwestern Bell Telephone Company*, 5 FCC Rcd 3792 (Com.Car.Bur. 1990). There is no material difference between Southwestern Bell's EDA service and BellSouth's EWP service. Thus, good cause exists to permit BellSouth to establish a separate rate subelement for EWP service and, therefore, we grant the waiver.

3. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone
and Telegraph Company

New York Telephone Company

Petition for Waiver of Part 69 of
the Commission's Rules for Electronic
Directory Assistance Service

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1990; Released: November 27, 1990

By the Chief, Common Carrier Bureau:

1. On July 10, 1990, the New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition for waiver of Part 69 of the Commission's Rules to establish new rate elements for Electronic White Pages (EWP) service.[1] This service would permit NYNEX customers to access electronic directory listings without operator interaction or reference to printed white pages. NYNEX's EWP service would provide access to a database which customers can use to obtain telephone numbers and addresses of telephone subscribers in NYNEX's service area by entering their names. NYNEX maintains that the information available through EWP is the same as that available through operator directory assistance. NYNEX Petition at 2-3. Specifically, NYNEX says its EWP service would not have "reverse search" capability, *i.e.*, this service could not be used to determine the name and address of an individual by entering his or her telephone number. *Id.* at 3.

2. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (together, US West), and American Telephone and Telegraph Company (AT&T), filed comments supporting the petition. Those comenters state that they see no difference between NYNEX's waiver request and the waiver the Bureau granted to Southwestern Bell for its Electronic Directory Assistance (EDA) service. US West Comments at 1-2, AT&T Comments at 1-3, *citing* Southwestern Bell Telephone Company, Petition for Waiver of Part 69 of the Commission's Rules, Revisions to Tariff F.C.C. No. 68, 5 FCC Rcd 3792 (Com.Car.Bur. 1990). NYNEX did not file a reply.

3. Section 1.3 of the Commission's Rules provides that waiver petitions will be granted "if good cause therefor is shown." Although electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service. A distinct charge to recover the unique costs of electronic directory assistance from only the users of that service would, therefore, be more consistent with the Commission's cost-causation policies. Thus, good cause exists to permit NYNEX to establish a separate rate subelement for EWP service and, therefore, we grant the waiver.

4. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by New England Telephone and Telegraph Company and New York Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] On September 7, 1990, NYNEX filed New England Telephone and Telegraph Company Transmittal No. 1088 and New York Telephone Company Transmittal No. 1081, to provide EWP service. No petitions were filed against these tariffs, which are scheduled to become effective December 6, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen Docket No. 90-287

In the Matter of

Northern California Region 6
Public Safety Plan

ORDER

Adopted: November 20, 1990; Released: November 29, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On April 24, 1990, Northern California (Region 6) submitted its Public Safety Plan (Plan) to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Northern California Plan was placed on Public Notice, 55 FR 22842 (June 4, 1990). The Commission received comments from the International Municipal Signal Association and the International Association of Fire Chiefs, Inc. (IMSA/IAFC) and the Northern California Chapter of the Associated Public-Safety Communications Officers, Inc. (No. Calif. APCO). Reply comments were received from the Region 6 Planning Committee (Region 6) and the Associated Public-Safety Communications Officers, Inc. (APCO).

3. IMSA/IAFC seeks amendment of the Northern California Plan insofar as IMSA/IAFC does not believe that it is consistent with the National Plan with regard to the disposition of released channels,[1] those lower band frequencies that would be released as a result of eligible entities obtaining frequencies in the 821-824/866-869 MHz bands. IMSA/IAFC states that the Northern California Plan is somewhat contradictory. This commenter notes, in this regard, that the Plan provides that, "Each individual Service Frequency Coordinator will be advised in a timely fashion of the release of any frequencies licensed in their particular service."[2] This commenter also observes, however, that the Plan goes on to state that, "The Review and Revision Committee will also consider arrangements between any two agencies for the exchange of frequencies or channels as an indication of advance planning and an effort to properly utilize the spectrum." [3] IMSA/IAFC argues that such advance planning precludes any opportunity the individual Service Frequency Coordinator might have had to recommend another applicant. IMSA/IAFC points out that there may be eligible entities whose needs are not known to the Northern California Regional Planning Committee because, for lack of interest in the 821-824/866-869 MHz bands, they did not participate in the planning process nor make their needs known. The service coordinators for the channels being relinquished are responsible for satisfying these entities' needs, states IMSA/IAFC.[4]

4. Region 6, in its Reply, states that the seeming contradiction results from IMSA/IAFC quoting from two parts of its Plan that refer to different frequency bands. The first quote, states Region 6, recognizes other coordinators' responsibilities and pertains to frequencies below 800 MHz. The second quote, according to Region 6, however, refers to the 800 MHz band where there is but one coordinator, APCO.[5] Nevertheless, Region 6 asks the Commission to accept an amendment to its proposed Plan qualifying the latter quote as pertaining to the 800 MHz band. According to Region 6, this amendment should "serve to clarify the intent and assure other coordinators there will be no effort to undermine their authority."[6]

5. Whenever any private radio licensee abandons a frequency, whether to be replaced by another frequency or not, the Commission's certified coordinators are expected to cooperate with each other regarding the availability of a vacated channel and its potential reassignment. Coordinator cooperation is fundamental to all Private Land Mobile Radio Services. Nowhere is the expectation and the necessity for it more clearly described than in the *National Plan*. Where a regional public safety planning committee makes a recommendation, based on its Plan, for the reassignment of a vacated channel, the coordinator responsible for the vacated channel must consider that recommendation but must also consider interference potential and the needs of other eligibles. For example, if a Fire Radio Service channel becomes available as a result of a licensee giving it up after moving to the 821-824/866-869 MHz bands, IMSA/IAFC would be responsible for coordinating new applications (whether for Fire or for interservice sharing) for that channel and in so doing should consider any recommendations made by the regional planning committee. APCO, being the Commission's certified coordinator for all public safety channels above 800 MHz, is bound to consider the interests of all eligible applicants for frequencies in the 806-824/851-869 MHz bands.

6. In its *Report and Order* (R&O)[7] creating the *National Plan*, the Commission stated:

> We expect that as licensees move to this new spectrum [821-824/866-869 MHz] they will make every effort to give up their lower band frequencies so that others may use them.[8]

In response to IMSA/IAFC's Petition for Reconsideration of the *National Plan*, the Commission stated in its *Memorandum Opinion and Order on Reconsideration* (MO&O on Reconsideration)[9]:

> Regional plans, however, may encompass consideration of other public safety and special emergency bands when the new frequencies are insufficient to meet the needs of the region.
>
> With regard to the licensing of channels recommended in the regional plans, eligibles applying for these channels must submit their applications to the appropriate frequency coordinator. The coordinator's first consideration in making assignments should be to the party identified in the regional plan. If, however, the coordinator determines that

> an assignment to that party would cause interference to an existing licensee, the coordinator shall inform the Commission of the potential for interference and recommend an alternative frequency for that applicant. This, of course, is consistent with current procedures followed by frequency coordinators.[10]

This issue of coordinator responsibility has been raised and addressed several times before, notably in the Petition for Reconsideration mentioned above, in the *Order* accepting the New York Metropolitan Area Public Safety Plan[11], and most recently in the Private Radio Bureau's *Order*, released August 9, 1990, denying IMSA/IAFC's Petition for Rule Making.[12] When a frequency obtained by means of interservice sharing is given up as a result of the licensee migrating to a higher band, the license must be returned for cancellation. Once a month, the Licensing Division sends all affected coordinators a copy of a computer-generated list of licenses for land mobile frequencies below 800 MHz deleted that month. That list, entitled "DELETE/PURGE REPORT," including all canceled licenses, is public information.

7. IMSA/IAFC indirectly raises an issue that is of particular concern to our two Bureaus: the matter of "farming down" or channel "swapping." Handing down vacated channels to another agency within the same jurisdiction may seem like a convenient method to re-use existing radio equipment. However, in order for such action to take place, the coordinator must first conclude that it represents the best coordinated use of the vacated channel. Therefore, each vacated channel must be released to its appropriate pool for proper reassignment. The radio spectrum remains a scarce resource and its proper and efficient use must take precedence over other considerations. Each public safety plan the Commission has approved (15 including this one) contains a method for ranking applicants' priority in the event there is a shortage of spectrum. Some regions have already had to use these methods for comparing applications. A well thought-out method of ranking applicants' needs, properly applied, will ensure the best possible use of these channels.

8. We recognize the effort that went into preparing the Region 6 Plan and commend the Northern California Regional Planning Committee for its efforts. The Northern California region presented a challenge in terms of its size, its many counties, its range in elevation (from -300 to +14,000 feet above sea level), and its vegetation levels that vary from desert to forest. The staff has worked closely with this Region and is satisfied with the resulting Plan. It conforms with the National Public Safety Plan and includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987). We believe the Region 6 Plan represents a careful balance of the current and projected mobile communications requirements of the public safety and special emergency entities in Northern California and will result in efficient use of the newly-allocated 800 MHz Public Safety radio spectrum.

9. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Northern California IS ACCEPTED, as amended by its reply comments. Furthermore, licensing of the 821-824/866-869 MHz band in Northern California may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] IMSA/IAFC Comments at 4.

[2] Plan at 14.

[3] Plan at 14.

[4] IMSA/IAFC Comments at 6-7.

[5] No. Calif. APCO Comments at 1.

[6] Region 6 Comments at 2.

[7] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987) [hereinafter *Report and Order*].

[8] *Report and Order* at para. 2.

[9] Memorandum Opinion and Order on Reconsideration, Gen. Docket No. 87-112, 3 FCC Rcd 5391 (1988) [hereinafter *MO&O on Recon*].

[10] *MO&O on Recon*, paras. 47-48.

[11] Order, Gen. Docket No. 88-476, 4 FCC Rcd 4457 (1989).

[12] Order, RM-6908. On September 11, 1990, IMSA/IAFC filed an Application for Review of the Bureau's Order. Action on this Application is still pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

HORSESHOE BAY CENTEX BROADCASTING CO. (Assignor) File No. BAPCT-890509KH

and

KINGSTIP COMMUNICATIONS, INC. (Assignee)

For Assignment of Construction Permit for Station KLNO(TV), Channel 14, Llano, Texas

HORSESHOE BAY CENTEX BROADCASTING CO. File No. BMPCT-890509KG

For Modification of Facilities of Station KLNO(TV), Llano, Texas

HORSESHOE BAY CENTEX BROADCASTING CO. File No. BMPCT-890509KF

For Extension of Time to Construct the Facilities of Station KLNO(TV), Llano, Texas

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 1990; Released: November 29, 1990

By the Commission:

1. The Commission has before it for consideration an application for consent to the assignment of the construction permit for unbuilt UHF television station KLNO(TV), Channel 14, Llano, Texas, from Horseshoe Bay Centex Broadcasting Co. (Horseshoe) to Kingstip Communications, Inc. (Kingstip),[1] licensee of station KXAN-TV (NBC, Channel 36), Austin, Texas. Horseshoe has also filed applications to modify the construction permit for station KLNO(TV) to change the transmitter site and to extend the time within which to construct the facility. The acquisition of KLNO(TV) by Kingstip will result in the overlap of the predicted Grade B contours of KLNO(TV), as modified, and Kingstip's station KXAN-TV in a manner inconsistent with Section 73.3555(a)(3) of the Commission's Rules which generally proscribes common ownership of two television stations whose Grade B contours overlap. However, Kingstip proposes to operate KLNO(TV) as a satellite[2] of KXAN-TV, and requests that the assignment be granted pursuant to the exception for satellite operations set forth in Note 5 to the Commission's multiple ownership rule, Section 73.3555.[3] A petition to deny the assignment was filed by Channel 6, Inc. (Petitioner), licensee of station KCEN-TV (NBC, Channel 6), Temple, Texas, and responsive pleadings were also filed.

THE SATELLITE PROPOSAL

2. The engineering exhibit submitted by Kingstip with the assignment application indicates that, as modified, the predicted Grade B contour of KLNO(TV) would encompass 7,087 square miles and a population of 128,617 persons. The exhibit further indicates that the predicted Grade B contour of KXAN-TV would encompass 8,285 miles and a population of 670,799 persons. The predicted overlap between KLNO(TV) and KXAN-TV would encompass 2,937 square miles with a population of 73,669 persons, which represents 41.4% of the area and 57.3% of the population within KLNO(TV)'s Grade B contour and 35.5% of the area and 11.0% of the population within KXAN-TV's Grade B contour. Kingstip submits that the actual Grade B overlap will be less because these figures do not take into account the hills west of Austin which cause severe degradation of KXAN-TV's service to the north and west of Austin toward Llano and would similarly affect KLNO(TV)'s proposed service to the south and east of Llano toward Austin. Kingstip contends that, based on terrain roughness contours, the actual overlap area of the two stations is 1,946 square miles with a population of 57,667 persons. Kingstip further states that the terrain-adjusted overlap area would encompass parts or all of seven Texas counties.

3. In support of its satellite proposal, Kingstip states that Llano, Texas is a small town of 3,420 residents located in a region of hills and small mountains within Llano County (population 12,500). Kingstip estimates that the county has a population density of only 13.3 persons per square mile. The community of Llano is miles from any major city. Austin, Texas, the closest major city, is 60 miles away, avers Kingstip, and no town within a 40-mile radius of Llano has a population of 10,000 persons. Kingstip further states that an analysis of the economic and demographic characteristics of the Llano market reveals that businesses there offer little potential for the television advertising necessary to support a nonsatellite television station. In this regard, Kingstip observes that Llano is "cattle and poultry country" and that there is no evidence that cattle ranchers or poultry farmers advertise on local television stations. Even if these businesses did advertise, Kingstip notes that their demand for advertising would be unpredictible, for farm earnings in Llano County have fluctuated widely from 39 million in 1982 to $7 million in 1984. Kingstip points out that the other major business in Llano County, granite quarrying, for similar reasons, would seem to have little or no demand for local advertising. Of the remaining retail businesses in Llano County that would be plausible purchasers of broadcast advertising, Kingstip asserts that very few are large enough to be purchasers of television advertising. For example, Kingstip states that there are 13 automotive dealers and service stations, but 11 have fewer than ten employees; there are 24 eating establishments, but 20 have fewer than ten employees. There are 19 grocery stores, but 14 have fewer

than ten employees. Kingstip further notes that of the 17 miscellaneous retail establishments in Llano County, 16 have fewer than ten employees. To the extent that any demand exists at all for local advertising, Kingstip contends that KLNO(TV) would have to compete with KLKM(FM), Llano's sole radio station, and *Llano News*, the weekly local paper with a circulation of 3,840.

4. Kingstip avers that one needs only to examine the size and purchasing power of the county labor force to understand why it is implausible that an independent television station could generate enough advertising revenue to survive as an independent station in Llano. In this regard, Kingstip notes that the civilian labor force of Llano County consists of only 4,948 persons. It is not a highly educated labor force, with nearly 44% of the population having less than 12 years of education. Moreover, 42.7% of the population is 55 years or older. Kingstip further notes that, in 1985, per capita income for Llano County residents was only $11,289, and that county residents saved 110.4 % more than the average American. Thus, Kingstip alleges that Llano residents apparently spend considerably less than most Americans on consumer goods. The result of the spending attitude of Llano residents, Kingstip urges, is weak demand for local advertising. Thus, Kingstip reasons that the economic and demographic composition of the Llano County market reveals that businesses there offer little potential for generating the local television advertising revenue necessary to support a nonsatellite, unaffiliated television station. Kingstip urges that the market characteristics noted above are the same characteristics which constituted compelling reasons justifying satellite operation in Fort Bragg, California, citing *Capital Foothill Broadcasters*, 4 FCC Rcd. 1429, 1430 (1989). Kingstip also notes that in *Laurel Television*, 2 FCC Rcd. 1359, 1361 (1987), the Commission authorized satellite operation where the economy of the community was weakened due to the decline in its main industrial businesses, and its unemployment was above the national average. Kingstip reasons that the recession in Texas and its impact on the Llano economy are factors which favor grant of satellite operation of KLNO(TV) by the Commission.

5. In addition to the economic conditions in Llano, Kingstip submits that Horseshoe's original proposal to operate KLNO(TV) as an independent UHF television station conflicts with the general composition of the Texas television marketplace. Kingstip states that fifteen Texas television markets[4] more populous than Llano do not support an unaffiliated television station, and that only San Antonio (42nd market), Houston (10th market), and Dallas-Fort Worth (8th market) currently support independent television stations. Kingstip also asserts that three network affiliated satellite stations provide the only Grade B service to the Texas counties in which their communities of license are located. Specifically, Kingstip states that KWAB(TV) (NBC) serves Big Spring, Texas, in Howard County; KTRE-TV (ABC) serves Angelina and Nacogdoches Counties; and KBTX-TV (CBS) serves Waco, Texas in Brazos County. These counties, Kingstip maintains, have greater populations, higher population densities, and more populous county seats than Llano County. Kingstip reasons that, if these counties can support only network affiliated satellite operations, it is evident that Llano County cannot support KLNO(TV) as an unaffiliated independent station.

6. Operation of KLNO(TV) as a satellite station, Kingstip contends, would not only ensure the station's construction and operation but would also provide off-the-air television service to all of Llano County and to much of adjacent counties west and northwest of Austin, Texas.[5] Kingstip asserts that KLNO(TV) would provide first Grade B television service to significant portions of Llano, Mason, San Saba and Lampasas Counties; and second Grade B service to other parts of Mason, San Saba and McCulloch Counties. Kingstip pledges to address the local needs and interests of Llano by inserting into the "Today Show", each weekday, a five-minute "cut-in" of Llano County and other local news. Kingstip also represents that it will maintain remote equipment in Llano County suitable for local origination of programming, and will broadcast programming from Austin incorporating issues of concern to Llano County residents.

7. In addition to the above public interest benefits, Kingstip asserts that operation of KLNO(TV) as a satellite station will not impair the level of diversity in Williamson, Travis and Burnet Counties, areas within the overlap area. Kingstip states that Williamson County receives Grade A and Grade B coverage from one educational and four commercial television stations in Austin, and Grade B service from four commercial television stations in the Waco-Temple market. Kingstip submits that two of the Waco-Temple stations, KWTX-TV and KCEN-TV, provide Grade B signals to the northwest corner of Travis County, where the overlap of KLNO(TV) and KXAN-TV is predicted to occur. Further, Kingstip claims that all four Waco-Temple stations provide Grade B service to the northeast section of Burnet County, an area which is located within the overlap of KLNO(TV) and KXAN-TV. Kingstip maintains that authorization of KLNO(TV) as a satellite of KXAN-TV would extend KXAN-TV's service to unserved and underserved areas.

The Extension of Time Request

8. Horseshoe was granted the construction permit for station KLNO(TV) on June 11, 1986. It states that it made substantial expenditures of money and manpower to effect the timely construction and operation of KLNO(TV). In that regard, Horseshoe submits that it completed construction of an access road to its transmitter site; graded and leveled this site; remodeled its studio facilities; and ordered studio, transmitter and antenna equipment. However, Horseshoe asserts that the capital necessary to complete construction and to fund the initial operation of KLNO(TV) was not available from financial institutions due to the severely adverse economic and banking conditions in Texas caused by the local recession. In that regard, Horseshoe submits that its letter of intent for funding from the First City Bank of Austin, Texas, which would have paid for the purchase of studio, transmitter and antenna equipment, was rescinded in 1988. Horseshoe also notes that its discussions with two other Texas banks to obtain funds were unsuccessful, and that its financing commitment from an Illinois investor did not materialize.

THE PLEADINGS

9. In its petition to deny, Petitioner first contends that the proposed assignment application for KLNO(TV) contravenes the Commission's Rules governing assignments of construction permits for unbuilt stations. Petitioner asserts

that since the application to assign the construction permit for KLNO(TV) was filed by the parties more than 12 months after its issuance, the Commission should not grant the assignment application unless Horseshoe has complied with the criteria set forth in *Broadcast Construction Periods*, 59 RR 2d 595 (1985). Specifically, Petitioner asserts that the recession was underway in Texas for at least one year when Horseshoe filed its application in late 1985, and certified in it that it had the financial resources to construct and operate its proposed station. Thus, Petitioner contends that the parties cannot claim that Horseshoe's failure to construct KLNO(TV) was due to a recent or unforeseeable event clearly beyond its control. Petitioner also submits that Kingstip cannot rely upon Horseshoe's allegation of unavailable financing since the Commission has determined that such circumstances are not beyond the control of the permittee. Petitioner further claims that the Commission stated in *Broadcast Construction Periods* that it will not entertain an assignment application filed after the expiration of the initial construction period. 59 RR 2d at 597.

10. Petitioner also argues that the substantial overlap between KLNO(TV) and KXAN-TV negates grant of Kingstip's satellite request. Petitioner alleges that the overlap area comprises between 42.7% to 39.5% of the proposed Grade B contour of KLNO(TV) and between 57.7% and 62.5% of the total population. Petitioner further contends that the overlap area within the KXAN-TV Grade B contour is 36.7% to 25.9% of that station's contour, and that 11.1% to 8.8% of the population within KXAN-TV's Grade B contour lies within the overlap area. Petitioner submits that this substantial degree of overlap distinguishes Kingstip's satellite request from the one granted in *Capital Foothill*. There, Petitioner asserts that the applicants submitted a terrain contour exhibit which effectively eliminated most of the actual signal overlap.

11. Petitioner maintains that, in view of the substantial overlap involved, Kingstip has not presented an adequate economic showing required by the Commission to support grant of its satellite request. Petitioner cites *Pete J. Stathakas*, 59 RR 2d 169 (1985) *recon. denied*, 60 RR 2d 1293 (1986), where the applicant submitted detailed economic projections to demonstrate why satellite operation was necessary. Petitioner states that, here, Kingstip relied exclusively on a profile of only one county out of the twelve which would receive Grade B service from KLNO(TV), and on the personal opinion of Horseshoe's President that nonsatellite television service in Llano is not possible. Thus, Petitioner contends that Kingstip failed to show that KLNO(TV) will not be viable without its operation as a satellite station.

12. With respect to the extension of time request, Kingstip maintains that the recession in Texas was an unforeseeable event beyond Horseshoe's control which foreclosed it from obtaining capital financing to construct KLNO(TV). Kingstip contends that Horseshoe realized that, in the wake of the state-wide recession, its construction and operation of KLNO(TV) as an unaffiliated station was not possible, and negotiated with Kingstip to purchase KLNO(TV) to ensure its prompt construction. Kingstip assures that it is capable and ready to construct KLNO(TV) promptly, contingent, however, upon the grant of the extension request and assignment application. Kingstip reiterates that its economic showing has substantiated the feasibility of network-affiliated satellite operation of KLNO(TV) as the only probable means of providing Llano, Texas with its first local broadcast service in the immediate future.

13. Kingstip also disputes Petitioner's contention that satellite operation of KLNO(TV) will erode KCEN-TV's market share in Lampasas and San Saba counties. Kingstip submits that its engineering exhibit shows that Lampasas and San Saba counties are located completely outside the predicted signal contour overlap between KLNO(TV) and KXAN-TV. Moreover, Kingstip claims that Petitioner's real concern is the competition between KLNO(TV), operating as a satellite station, and KCEN-TV for viewers and advertising revenues. Kingstip asserts, however, that Petitioner's allegation of economic injury to KCEN-TV has been rejected by the Commission, citing *Pete J. Stathakas*, 59 RR 2d 169, 173 (1985), *recon. denied*, 60 RR 2d 1293 (1986) and *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd. 638 (1988).

DISCUSSION

14. The goals of our multiple ownership rules are to promote economic competition and diversity of programming viewpoints. *See e.g., Multiple Ownership of Standard, FM and Television Stations*, 45 F.C.C. 1476, 1476-77, *reconsideration denied*, 45 F.C.C. 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 of Section 73.3555 of the Rules. What constitutes a sufficient showing for an exception to the duopoly rule for a satellite operation has been established by case law and involves a balance of various factors, including the degree of overlap between the stations, the capacity of the market to support a full-service station, the level of service available in the market, the financial difficulties of the stations involved, as well as other considerations. *See Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, FCC 90-279 (adopted August 1, 1990) paras. 2, 10.

15. We believe that a sufficient showing has been made to justify authorization of satellite operation in Llano, Texas. Operation of KLNO(TV) as a satellite station would provide Llano County residents with their first local television station and with weekday, local news programming specifically oriented to that area. KLNO(TV) will also provide first Grade B television service to significant portions of Llano, Mason, San Saba and Lampasas, and second Grade B service to other parts of Mason, San Saba and McCulloch Counties, areas west and northwest of Austin, Texas. In short, there are significant underserved areas that would receive service from the proposed satellite operation, thereby furthering the primary goal of our satellite policies. *Compare Mary R. Kupris*, 5 FCC Rcd. 3828, *reconsideration denied*, 5 FCC Rcd. 5142, *appeal pending sub nom. WLOS TV, Inc. v. FCC*, No. 90-1251 (D.C. Cir.).

16. In addition, there is moderate overlap of stations KLNO(TV) and KXAN-TV, and it appears from the map submitted by the parties that the overlap area will occur in portions of seven counties.[6] However, most of the overlap area falls within Burnet and Blanco Counties, which are sparsely populated. Further, within the overlap area there are numerous broadcast signals already re-

ceived from television stations licensed in the Austin and Waco-Temple, Texas markets, so the impact on diversity and market concentration will be minimal. Although Llano is part of the Austin, Texas ADI (71st market), Llano itself is a small, isolated community of 3,420 located in the hills of Llano County miles from any major city. Out of the 12,500 residents of Llano County, 4,948 derive their annual income primarily from the livestock and poultry industries whose yearly earnings are unstable. It appears that these industries, as well as the retail and granite quarrying businesses in Llano County, have little or no demand for local television advertising, and, therefore, do not generate any sizable volume of advertising sales revenue for the Llano, Texas market. Furthermore, KLNO(TV) must compete with Llano's sole radio station and only weekly newspaper for the limited local advertising revenue that is available. Thus, it appears that the economic and demographic composition of the Llano, Texas market is insufficient to support an independent full-service station. *See Capital Foothill*, 4 FCC Rcd. at 1430; *Laurel Television*, 59 RR 2d at 1340.

17. Finally, with respect to the application of Horseshoe for an extension of time within which to construct, we are persuaded that a sufficient showing has been made to justify grant of the extension application. Before an extension application can be granted, Section 73.3534(b) of the Commission's Rules requires a showing that either substantial progress has been made in the construction of the station or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and proceed with construction. In this instance, Horseshoe completed the following: (1) construction of an access road to its transmitter site; (2) grading and leveling of this site; (3) remodelling of its studio facilities; and (4) ordering studio, transmitter and antenna equipment. It was also during this time that a state-wide recession in Texas was occurring, causing numerous business failures and causing the Federal Deposit Insurance Corporation (FDIC) to intervene in the management of many Texas financial institutions and to restrict the availability of commercial credit in that state. As a direct result of the FDIC's lending restrictions, the First City Bank of Austin, in 1988, rescinded its financing commitment on which Horseshoe was relying to purchase the studio, transmitter and antenna equipment that it had ordered. In November 1988, Horseshoe negotiated an alternative financing commitment with Richard J. Clark & Associates of Park Ridge, Illinois which was also subsequently cancelled. Then in early 1989, the discussions Horseshoe had with two other Texas banks failed. Ordinarily, the unavailability of funds is not considered a cause beyond the control of the permittee. In this instance, however, it appears from the foregoing factual chronology that Horseshoe made diligent and continual attempts to complete construction of KLNO(TV) only to see its efforts unexpectedly and summarily defeated by the repeated cancellation of *committed* financing from traditional capital sources. *See L.E.O. Broadcasting, Inc.*, 62 RR 2d 996 (Mass Media Bureau 1987). After exhausting these lending sources, in March 1989, Horseshoe finally entered into discussions with Kingstip for it to purchase KLNO(TV) and operate it as a satellite station. In addition to the construction progress noted above, we are persuaded that Horseshoe's inability to complete construction of the facility, was due to circumstances beyond its control. For the same reason, the filing of the assignment application more than 12 months after the issuance of the construction permit is also permitted.

OTHER MATTERS

18. Section 73.3597 of the Commission's Rules limits reimbursements to the seller of a construction permit for an unbuilt station to an amount clearly shown to have been legitimately and prudently expended by the seller, solely for advocating the grant of the construction permit for the station, and for placing it into operation. In that connection, we note that the Asset Purchase Agreement executed by the applicants provides for consideration in the amount of $100,000 which includes Horseshoe's legitimate and prudent expenses incurred in pursuit of authorization and construction of KLNO(TV). In addition to this consideration, Kingstip also agreed to reimburse Horseshoe for its additional, unspecified out-of-pocket costs for legal and engineering fees and expenses involved in the preparation and prosecution of the three above-captioned applications. Further, as stipulated in the Purchase Agreement, Kingstip has proposed entering into a Consulting Agreement with Judge A. W. Moursand (Moursand), President of Horseshoe, with the understanding that he will receive $75,000 in fees to be paid for three years of advising Kingstip on programs, station activities and public affairs specifically oriented to Llano residents.

19. In order to comply with Commission precedent, the consultancy agreement must be made independent of the assignment application. *Central Television, Inc.*, 60 RR 2d 1297 (1986), *appeal dismissed*, 834 F.2d 186 (D.C. Cir. 1987). In this instance, payments to Moursand are to be made on dates and terms determined by the purchase agreement underlying the assignment transaction. This contingency makes the payment an unavoidable part of the assignment transaction, raising the total consideration for the construction permit in excess of the demonstrated allowable expenses. Thus, we cannot approve the subject consultancy agreement. Further, the legal expenses incurred by Horseshoe in opposing the petition to deny the extension application are reimbursable under Section 73.3597. *LUB Television Associates, Ltd.*, 95 FCC 2d 661, 666 (1983). However, the other assignment expenses are unrelated to the legitimate and prudent expenses necessary to secure or retain a permit, or to commence operations, and are, for this reason, not reimbursable under Section 73.3597 of the Commission's Rules. *Id.* at 665-66.

20. Accordingly, IT IS ORDERED, That the petition to deny filed by Channel 6, Inc. IS DENIED.

21. IT IS FURTHER ORDERED, That the above-captioned application (BAPCT-890509KH) for consent to the assignment of the construction permit for unbuilt station KLNO(TV), Llano, Texas, from Horseshoe Bay Centex Broadcasting Co. to Kingstip Communications, Inc., IS GRANTED, subject to the condition that payments not exceed $100,000.00.

22. IT IS FURTHER ORDERED, That application (BMPCT-890509KG) to modify the authorized facilities of KLNO(TV), and the application (BMPCT-890509KF) for extension of time to construct ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Kingstip is owned by LIN Broadcasting Corporation. On October 26, 1989, the Commission affirmed the staff action granting the application to transfer control of LIN to MMM Holdings, Inc., a wholly-owned subsidiary of McCaw Cellular Communications, Inc. *MMM Holdings, Inc.*, 4 FCC Rcd. 8243 (1989). On March 5, 1990, the transfer of control of Kingstip from the public stockholders of LIN to McCaw was consummated.

[2] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a statellite" airs most of its parent's programming but produces less than five percent of its programming locally. *See, e.g., Amaturo Group, Inc.*, 68 FCC 2d 899 (1978). Kingstip does not propose to construct and operate a local studio in Llano, Texas. However, it represents that it will maintain remote equipment in Llano County suitable for local origination.

[3] Section 73.3555(a) (3) of the Commission's Rules provides that "no license for a television broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates or controls one or more television broadcast stations and the grant of such license will result in any overlap of the grade B contours of the existing and proposed stations. . . ." However, Note 5 to Section 73.3555 states that "paragraphs (a) through (d) of this Section will not be applied to cases involving television stations which are primarily 'satellite' operations," and "such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

[4] These markets are Victoria, Laredo, San Angelo, Abilene-Sweetwater, Lubbock, Odessa-Midland, Wichita Falls, Beaumont-Port Arthur, Tyler-Longview, Corpus Christi, Amarillo, McAllen-Brownsville, El Paso, Waco-Temple and Austin.

[5] These counties are Gillespie, Mason, McCulloch, San Saba and Lampasas.

[6] KXAN-TV has submitted percentages of overlap based on terrain roughness calculations that consider widely varying terrain. In addition, KXAN-TV submitted contour figures based on the predicted method set out in Sections 73.684 and 73.699. An examination of the terrain in the Llano-Austin area of Texas indicates, however, that the terrain is typical. That is, wide departures from average elevations do not generally exist. Therefore, for our purposes, we will only consider the figures given for the area, population and overlap which are based on the predicted method of calculation.

[7] The applicants may submit to the staff written documentation and itemization of the separated legal fees incurred and paid in opposing the petition to deny the extension application in this proceeding. If the staff finds that the seller's expenses comport with our rules, the additional amount may be approved by delegated authority.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the
Commission's Rules Relating to
License Renewals in the Domestic
Public Cellular Radio
Telecommunications Service

ORDER

Adopted: November 21, 1990; Released: November 23, 1990

By the Chief, Common Carrier Bureau:

1. On November 16, 1990, Telocator requested an extension of time to December 12, 1990, to file reply comments on the Notice of Proposed Rule Making (Notice) in the above-referenced proceeding. Reply comments currently are due on or before November 28, 1990.

2. Telocator asserts that about twenty-five comments were filed in response to the Notice. Telocator also states that even though there may be substantial agreement among many of the commenting parties on the proposals contained in the Notice, there are still areas about which Telocator would like to consult with its members in order to develop a consensus, such as the nature of appropriate comparative criteria to be used during any renewal hearings. Telocator claims that an extension of two weeks will facilitate the efforts of interested parties to address these matters, which should enhance the Commission's consideration of these issues by presenting a more complete record.

3. We find that good cause has been shown for a two-week extension of time, the grant of which will not significantly delay this proceeding. Accordingly, the extension of time request IS GRANTED and reply comments on the above-referenced Notice from all parties are due on or before December 12, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a construction permit to
establish a new cellular system
to operate on Frequency Block A
in the Domestic Public Cellular
Telecommunications Radio service
to serve the Kansas - 3 (Jewell)
Rural Service Area

HEARING DESIGNATION ORDER

Adopted: November 21, 1990; Released: November 26, 1990

By the Chief, Common Carrier Bureau:

1. Nancy Naleszkiewicz was named non-wireline tentative selectee for the Kansas 3 (Jewell) Rural Service Area (RSA) on November 13, 1989. Her qualificatons were challenged in a "Petition to Designate for Hearing" filed by the Committee for a Fair Lottery (the Committee) and in a "Petition to Dismiss or Deny" filed by Pacific Nationwide Cellular (Pacific). Nancy Naleszkiewicz has filed a consolidated opposition to the petitions as well as a Motion to Strike the petition filed by the Committee. The applicant also filed a "Section 1.65 Amendment and Petition for Waiver" which resulted in additional pleadings being filed by the petitioners. Various supplements, comments and oppositions to these filings are also under consideration. In addition, a group of applicants for the Kansas 3 RSA jointly filed comments and various other pleadings. They will be referred to as Commenters.

I. MOTION TO STRIKE

2. In her Motion to Strike the applicant notes that the Committee failed to identify itself or provide any information about its purpose, membership or officers in its Petition. Consequently, according to the applicant, the Committee has failed to establish its standing as required by Section 309(d)(1) of the Communications Act and Section 22.30 of the Commission's Rules.

3. The Committee filed an Opposition to the Motion to Strike which included a declaration from Thomas Domencich signed under penalty of perjury. Mr. Domencich indicates that he filed applications in all the RSA markets including Kansas 3. He also states that he is a member of and contact representative for the Committee, which he describes as a voluntary association of RSA applicants whose purpose is to curb abuses of the Commission's lottery process. Domencich states that all Committee members filed applications in some or all of the RSA markets, but he does not identify any of the other members or indicate how many members there are. Domencich contends that the Committee, as a representative of its individual members, has a legitimate interest in this proceeding.

4. The Committee states that its members who have won cellular lotteries in other markets are concerned that they would be the subjects of retaliatory filings by applicants seeking to gain bargaining leverage and, therefore, it has not identified its members other than Domencich. It claims that Commission precedent does not require that the Committee identify all of its members or otherwise provide extensive information about the organization, citing *Petitions To Deny*, 82 FCC2d 89 (1980).

5. In her response to the Committee's opposition the applicant states that the Committee should have made its standing showing when it filed its Petition and should not now be permitted to supply the material. Also, according to the applicant, the Committee has still failed to supply sufficient information about its composition or about the one member whose declaration it submitted. The applicant cites *Corpus Christi Cellular Telephone*, 3 FCC Rcd 1889 (Mob. Ser. Div. 1988), for the proposition that a petitioning association must list the names and residences of the interested parties or justify its failure to do so by establishing that there would be reprisals against the individuals.

6. The Committee was remiss in not including its standing showing in its Petition. Nevertheless, its failure to do so is not fatal to its claim of standing. The member whose declaration the Committee submitted is an applicant in the market at issue and would have standing individually. The standing of one member is sufficient to confer standing on the association itself. *See, Petitions to Deny*, 82 FCC 2d at 96 (1980). In *Corpus Christi Cellular Telephone Co., supra*, an organization was denied standing when it had failed to identify or submit the affidavit from any member who could have qualified for standing as an individual. That is not the case here. Moreover, the Commission accepts late filed affidavits to cure defects in Petitions to Deny where the affidavit is promptly submitted and it does not appear that the petitioner has abused the Commmission's process. *Waterway Communications Systems, Inc.*, 51 Rad. Reg. (P & F) 1655 (1982). Accordingly, Naleszkiewicz's Motion to Strike is denied and the Committee is deemed to have standing.

II. THE PETITIONS

7. The Committee urged two grounds for designating the application for hearing. First, the Committee alleges that Naleszkiewicz has an ownership interest in more than one application in the market in violation of Section 22.921(b) of the Commission's Rules. The other application in which the Committee alleges that Naleszkiewicz has an ownership interest is that of her husband, Wladimir Naleszkiewicz. The Committee acknowledges that a spousal relationship, standing alone, is not enough to create a presumption that the ownership interests are not separate. However, the Committee contends that there are other factors which show that Nancy and Wladimir Naleszkiewicz each filed an application in the market so that they would get "two bites at the apple." The additional factors cited by the Committee are that Nancy and Wladimir Naleszkiewicz are co-officers and the sole

stockholders of a company named Genesis Enterprises, Ltd. (Genesis) and that Genesis likely prepared both of the applications.

8. The Committee also claims that Nancy Naleszkiewicz does not have the character qualifications to be a licensee of the Commission. In support of its request that we designate for hearing a character qualifications issue the Committee refers to the indictment of Wladimir Naleszkiewicz and Genesis on mail fraud allegations (18 U.S.C. §1341) and, as to Wladimir Naleszkiewicz (but not Genesis), for allegedly having made false statements to the United States Postal Inspection Service (18 U.S.C. §1001). Pacific also refers to the indictment in its Petition.

9. A copy of the indictment was attached to the Committee's Petition. The indictment, which was filed on December 5, 1989, states that Genesis was in the business of preparing and filing cellular applications for its clients. Genesis was owned by Wladimir and Nancy Naleszkiewicz and they were the only corporate officers. Wladimir was the President and Nancy was the Vice-President and Secretary of the company. The indictment indicates that Genesis, acting through Wladimir Naleszkiewicz and Nancy Naleszkiewicz, created various bank accounts, including escrow and escrow disbursement accounts, for the purpose of handling the funds provided by its clients for the payment of Commission filing fees. According to the indictment, beginning in June of 1988 Genesis and Wladimir Naleszkiewicz diverted funds intended for deposit in the escrow accounts and deposited them instead in Genesis' general business account. Officer salaries and other operating expenses were paid from the general business account. Also, according to the indictment, Wladimir Naleszkiewicz diverted money that the clients had provided for the fees to his own personal use, and by December of 1988 Wladimir Naleszkiewicz knew that the escrow accounts had been depleted of cash. The indictment states that on or about January 5, 1989, Genesis and Wladimir Naleszkiewicz, knowing that they lacked the $139,000 required for the filing fees, failed to send approximately 697 applications on behalf of 39 clients to the Commission during the three day filing window that ended on January 6, 1989.

10. The indictment states that Genesis and Wladimir Naleszkiewicz continued their scheme to defraud when they failed to file approximately 741 applications on behalf of 40 clients on or about January 12, 1989, because they were lacking the required $148,200 for filing fees. The indictment states that Wladimir Naleszkiewicz and Genesis "operating through Nancy Naleszkiewicz" sent so called "lulling letters" which were signed by Wladimir Naleszkiewicz and falsely assured clients that their applications had been filed and that the filing fees had been paid. The first ten counts of the indictment are based on the mailing of the "lulling letters" to each of ten clients in violation of Title 18, United States Code, Section 1341. Wladimir Naleszkiewicz was also indicted for making false statements to the United States Postal Inspection Service. Specifically, the indictment indicates that Wladimir Naleszkiewicz falsely stated to the Postal Service that Genesis had filed all the applications at the Commission via Federal Express, that Genesis never verified that any checks drawn against the escrow accounts had actually been cashed by the Commission, and that Genesis had $100,000 remaining in its disbursement accounts after the filing periods for all RSA markets had ended. These false statements were alleged to be in violation of Title 18, United States Code, Section 1001.

11. In addition to the allegation that Nancy Naleszkiewicz is unqualified to be a licensee because of her possible involvement in the alleged fraudulent scheme, Pacific alleges that she has either alienated her interest in the instant application or has, at least, attempted to do so. In support of this allegation, Pacific attaches a FAX transmission dated November 15, 1989 from Genesis. The FAX cover sheet does not show an addressee. The documents being FAXed are not executed but appear to be a loan agreement with security provisions. The proposed loan was for $150,000 and the proposed debtor was Nancy Naleszkiewicz. The creditior would be given a 5% equity interest in the Kansas 3 RSA. The agreement provides that the interest granted to the creditor will become effective only upon grant of the construction permit. The documents do not identify the potential creditor who would receive the 5% interest in the RSA permit.

12. Finally, Pacific makes reference to two Commission public notices and a letter from the Chief of the Common Carrier Bureau to Genesis which indicate that in November of 1989 Genesis attempted to late file the applications referred to in the indictment. Pacific assumes that the filing fees that accompanied these applications (which were not accepted for filing) were not returned and that "the Naleszkiewicz's" have suffered a $300,000 loss. Pacific argues that an inquiry is needed to determine the effect of this loss on the applicant's financial qualifications.

III. APPLICANT'S RESPONSE

13. In opposition to the petitions Nancy Naleszkiewicz states that she does not have and has never had an interest in any application other than her own for the Kansas 3 RSA market and that her husband has never had an interest in her application. She indicates that before they filed RSA applications she and her husband agreed that each would file separate applications and that it has always been her intention, should she win an RSA lottery, to be solely responsible for all decisions and any debts. She also states that any profits from the sale or operation of the system would be her own. She claims that there are no written or oral agreements which are inconsistent with her assertion that the Kansas 3 application is her own and that her husband has no interest in the application. The applicant also submitted a statement from Wladimir Naleszkiewicz in which he asserts that he filed his own application for the Kansas 3 market and does not have and never has had an ownership interest in any other application for that market.

14. The applicant also denies that she has alienated any interest in the prospective authorization. She acknowledges that she explored the possibility of raising funds in order to assist her husband and Genesis in their attempt to "refile" certain RSA applications at the Commission and that she received the loan proposal attached to Pacific's Petition. She states that the proposal came from an "outside party" who advised her that the agreement was consistent with Commission rules. Nancy Naleszkiewicz indicates that she had the agreement sent to prospective creditors before she had an opportunity to "carefully review it or seek counsel's views." She indicates that on

advice of counsel she decided not to enter into such an agreement and has not done so. Therefore, according to the applicant, she has not alienated an interest in her application in violation Section 22.922 of the rules as alleged.

15. In her opposition to Pacific's request for a financial inquiry, the applicant points out that her financial proposal as set forth in her application has not been challenged. Nor has the lender informed her that it is unwilling to stand by the firm financial commitment letter it issued. Moreover, the applicant notes that the filing fees tendered by Genesis with the applications it submitted with its request for inclusion in the lotteries have not been deposited.

16. The applicant maintains that the indictment of her husband and Genesis does not raise any questions regarding her own qualifications to be a licensee. In fact, she states, even if they were to be convicted of the charges there is no reason to believe that she has participated in unlawful conduct. In a sworn statement Nancy Naleszkiewicz stated:

> . . . I do not now have, and never have had, any knowledge of, nor have I participated in, any alleged scheme to defraud clients of Genesis of money or any other thing of value, or any alleged criminal activity related thereto. To my knowledge, no such scheme exists or ever has existed. My responsibilities at Genesis are administrative in nature; with rare exception I do not deal with clients or handle the company's finances.

Consolidated Opposition to Petition to Designate for Hearing and Reply to Petition to Dismiss or Deny, Attachment A. Nancy Naleszkiewicz also argues that because the government did not indict her it is apparent that the authorities who investigated the allegations of misconduct must have concluded that, based on the evidence before them, she was not guilty of any wrongdoing.

IV. COMMENTS

17. The Commenters also addressed the petitions filed by the Committee and Pacific. The Commenters state that they were Genesis clients who filed applications for the Kansas 3 RSA but whose applications for other RSAs were among those that were not filed by Genesis. They request that the Commission hold action on the instant application in abeyance pending the outcome of the criminal case as well as civil litigation that they may be initiating against the Naleszkiewiczs. In support of this request the Commenters indicate that Nancy Naleszkiewicz's Kansas 3 RSA application and possible license are among the assets that would be available to recompense them for their losses. Pacific responded to the Commenters with a motion to strike based on procedural and substantive grounds. Procedurally, Pacific notes that Section 1.823 provides for the filing of petitions to deny and a consolidated reply. It does not provide for the filing of comments on a petition to deny by someone other than the tentative selectee. Pacific claims, in any event, that the Commenters have not shown how withholding action on the application will promote the public interest or that they will be irreparably harmed if action is not held in abeyance.

V. THE PLEA AGREEMENT

18. On February 8, 1990, Wladimir Naleszkiewicz, Genesis and Nancy Naleszkiewicz entered into a plea agreement which was reported to the Commission by Nancy Naleszkiewicz in a Section 1.65 Amendment and Petition for Waiver filed March 1, 1990. Pursuant to the agreement, Wladimir Naleszkiewicz pleaded guilty to two counts of mail fraud (18 USC §1341). Also under the plea agreement Wladimir Naleszkiewicz, Nancy Naleszkiewicz and Genesis entered into an arrangement to make restitution to the Genesis clients whose applications had not been filed. The cornerstone of the restitution plan is Nancy Naleszkiewicz's agreement to assign the Kansas 3 construction permit to a trustee who will sell the permit and use the funds received from the sale to recompense the injured parties. The first $287,600 will reimburse the victims for their lost filing fees. The next $287,600 will be distributed to the injured Genesis clients to compensate them for services not performed by Wladimir Naleszkiewicz when he failed to file the applications. The balance of the funds will be divided between the applicant and the victims by following a formula discussed below in the section that addresses the applicant's waiver request. If Nancy Naleszkiewicz does not receive a construction permit, she has agreed to be held jointly and severally liable (with Genesis and Wladimir Naleszkiewicz) to make restitution of $287,600 to the victims of the scheme.

19. The plea agreement further provides that the United States Attorney will move for dismissal of the charges against Genesis and will not bring criminal charges against Nancy Naleszkiewicz for any involvement she may have had with the criminal conduct. The plea agreement specifically states that it does not constitute an admission by Nancy Naleszkiewicz of any knowledge of or complicity in the crimes committed by her husband.

20. Attached to the plea agreement is a Statement of Facts in which the United States Attorney describes what would have been proven had the case gone to trial. The Statement of Facts was signed by Wladimir Naleszkiewicz and Nancy Naleszkiewicz. The Statement of Facts indicates that in December of 1988 Wladimir Naleszkiewicz embarked on a scheme to defraud his clients of the opportunity to participate in the cellular lotteries. He did this in order to avoid financial difficulties and save himself from embarrassment in the communications industry. As part of the scheme, Wladimir Naleszkiewicz failed to file 1,438 applications that were supposed to have been filed to meet the January 1989 filing deadlines. To further his scheme, Wladimir Naleszkiewicz sent "lulling letters" to the clients falsely advising them that their applications had been filed and that the fees had been paid. As a result of this scheme Wladimir Naleszkiewicz defrauded his clients out of $287,600.

21. When she submitted the plea agreement to the Commission Nancy Naleszkiewicz reaffirmed her earlier statement in which she denied any involvement in or knowledge of the fraudulent scheme. She stated that she entered into the plea agreement in order to assist her husband to reach a negotiated resolution of the criminal charges against him and to assist him in making restitution to the victims of the fraud.

22. The advent of the plea agreement prompted the Committee to file a Supplement to Petition to Designate for Hearing.[1] The Committee argues that the plea agreement raises new questions concerning Nancy Naleszkiewicz's involvement in the mail fraud scheme and

also suggests that she made material misrepresentations to the Commission. Pacific addressed the plea agreement in a pleading opposing the Section 1.65 Amendment and Petition for Waiver filed by the applicant.

23. It is the Committee's contention that Nancy Naleszkiewicz misrepresented facts to the Commission in her opposition to the Petitions when she denied any knowledge of a scheme to defraud Genesis clients. The Committee bases its conclusion on Nancy Naleszkiewicz having signed the Statement of Facts that is associated with the plea agreement and which describes the fraudulent scheme that resulted in Wladimir Naleszkiewicz's conviction. The Committee claims that the applicant told the Commission one story in her opposition which was filed on January 29, 1990, and a different story to the court when she signed the Statement of Facts on February 8, 1990. The Committee also notes that Genesis had filed requests with the Commission in November of 1989 seeking acceptance of the unfiled applications and alleging that they had been duly filed. The Committee asserts that Nancy Naleszkiewicz also must be held responsible for those misstatements because of her association with Genesis.

24. The Committee also claims that Nancy Naleszkiewicz's willingness to accept liability for making restitution to the Genesis victims indicates that she was directly involved in the fraudulent scheme. The Committee's suspicions are butressed, they claim, by the provisions in the plea agreement which obligate the prosecutor not to bring criminal charges against Nancy Naleszkiewicz for any involvement she may have had in the fraud.

25. The Committee argues that there is specific evidence that Nancy Naleszkiewcz was directly involved in the scheme. It notes that when Genesis sought to have the unfiled applications included in the lotteries it attached copies of checks that Genesis had written as application filing fees. All those checks had been signed by Nancy Naleszkiewicz. The Committee also submitted a statement from Mary Jennings, who is a former Genesis employee, indicating that Nancy Naleszkiewicz was responsible for the accounts receivable and payable and also often signed checks for Genesis. According to Jennings, who worked at Genesis as assistant to the President from January of 1986 until April of 1987, Nancy Naleszkiewicz functioned as the "right hand" of her husband, was involved in all Genesis projects, and ran Genesis when Wladimir Naleszkiewicz was ill.

26. Based on the above, the Committee urges the Commission to inquire into whether Nancy Naleszkiewicz misrepresented material facts to the Commission regarding her involvement in the scheme, whether she misrepresented facts regarding her involvement and responsibilities as Genesis, and whether she was personally involved in the fraud. Also, according to the Committee, the applicant's agreement to use the proceeds of the sale of the construction permit to make restitution to the victims of the fraud committed by her husband is a further indication that Nancy and Wladimir Naleszkiewicz did not file individual applications.

27. Pacific claims that the provisions in the plea agreement demonstrate that the government was concerned about Mrs. Naleszkiewicz's involvement in the mail fraud scheme. Also, Pacific notes that the lulling letters that were sent to clients by Wladimir Naleszkiewicz were written on Genesis letterhead and that because the applicant is an officer of Genesis there are questions raised concerning her involvement in the scheme.

28. Pacific also claims that the applicant has misrepresented facts, or lacked candor, in her assertion that with rare exception she did not deal with Genesis clients or handle the company's finances. Pacific notes that Nancy Naleszkiewicz signed six Genesis checks dated January 11, 1989, and twenty-two Genesis checks dated January 4, 1989. Pacific located the checks in the file maintained by the United States District Court for the Eastern District of Virginia. The checks in question are made payable to the Federal Communications Commission and are the filing fees for rural cellular applications that were filed for the same markets involved in the fraudulent scheme. Pacific argues that Nancy Naleszkiewicz was directly involved in Genesis' financial matters and must have known the balance of the checking account.

29. After the release of the Lottery Notices for the markets involved in the fraudulent scheme, Genesis filed requests that the unfiled applications be included in the appropriate lotteries. Genesis alleged that the applications had indeed been delivered by Wladimir Naleszkiewicz to Federal Express and that Federal Express had delivered them to the Commission's filing facility in Pittsburgh. Genesis suggested that the applications had been lost or misplaced by the Commission. In support of its contentions Genesis submitted affidavits from Wladimir Naleszkiewicz and various Genesis employees. It did not, however, submit an affidavit or statement from Nancy Naleszkiewicz. Pacific contends that the subsequent conviction of Wladimir Naleszkiewicz demonstrates that the requests filed by Genesis for inclusion of the unfiled applications in the lotteries were frivolous and that Genesis made material misrepresentations to the Commission. Moreover, Pacific would attribute these misrepresentations to the applicant because of her position as an officer of Genesis.

30. Finally, Pacific contends that Genesis, Nancy Naleszkiewicz and the defrauded applicants may have been part of a scheme by which Genesis had an undisclosed interest in its clients' applications. Pacific notes that the Statement of Facts associated with the plea agreement concludes that Wladimir Naleszkiewicz diverted $287,600 from the defrauded clients and that he admitted that the amount constituted a "fair and just approximation" of the total loss caused to these clients. Pacific concludes that since $287,600 represents the filing fees for the unfiled applications, the clients paid nothing for their preparation and Genesis must have had an undisclosed interest in each of the (unfiled) applications. Pacific recommends that the Commission investigate whether Genesis was the real party in interest behind the applications or had an undisclosed ownership interest and whether Nancy Naleszkiewicz was involved in the scheme.

31. The applicant responded to the arguments raised by the Committee and Pacific regarding the significance of the plea agreement. She argues that the Committee's Supplement to its Petition is procedurally defective and should be dismissed as an unauthorized pleading. The applicant notes that Section 1.823(b)(2) of the Commission's rules provides for the filing of Petitions to Deny and replies and nothing more. The applicant claims that the Committee is using the plea agreement and the statement of a former Genesis employee (Mary Jennings) as a pretext for filing an unauthorized reply to the responses

that she had made to the petitions. The applicant disagrees with the Committee's position that new evidence warranted the submission of supplemental pleadings.

32. Nancy Naleszkiewicz also addressed the merits of the Committee's arguments. She disagrees that the plea agreement provides a basis for inquiring into her participation in the fraudulent scheme or that it raises concerns about possible misrepresentations made by her to the Commission. She states that she signed the plea agreement to protect her husband and that it did not constitute an acknowledgement that she participated in or knew about the fraud. She notes that she was not a defendant in the criminal proceeding and that the charges against Genesis were dropped. Specifically, Nancy Naleszkiewicz states: "I specifically repeat that I have never had knowledge of, nor have I participated in, any scheme to defraud Genesis clients or any criminal activity related thereto."

33. The applicant reaffirmed that her duties at Genesis were administrative and that she handled the company's finances on rare occasions. She qualified these representations, however, by explaining that she was only addressing the time period relevent to the events described in the plea agreement. She acknowledged that throughout her association with Genesis she handled the accounts payable and signed company checks (including those written to pay Commission filing fees). She states that during a period of time in 1986 and 1987 when Mary Jennings was employed at Genesis she temporarily assumed control of Genesis' daily operations. Her husband had undergone heart bypass surgery and, according to the applicant, Jennings' statement reflects the situation that existed only temporarily. When Mr. Naleszkiewicz returned to work she again assumed her administrative duties. She describes Jennings as a disgruntled former employee and notes that Jennings had left Genesis before Genesis had begun filing RSA applications.

34. Nancy Naleszkiewicz did not comment in any detail regarding her knowledge of or participation in the filing of Genesis' requests for inclusion of the unfiled applications in the lotteries in which Genesis falsely claimed that the applications had actually been filed. She merely noted that because of the administrative nature of her duties at Genesis she did not sign the November 1989 requests for inclusion.

35. In reply to Pacific's opposition to her Section 1.65 Amendment and Petition for Waiver the applicant contends that Pacific is wrong when it states that the government was very concerned about her involvement in the fraudulent scheme. She notes that when Wladimir Naleszkiewicz entered his guilty plea in the Federal District Court, the prosecutor stated in court that nothing in the plea agreement should "indicate that she [Nancy Naleszkiewicz] has knowledge or complicity in the crimes involving her husband . . . "

36. The applicant addressed the question of her knowledge of or participation in the scheme to defraud. She stated: " As I have done in my prior sworn statements filed in this proceeding, I again emphatically deny participation in, or having had knowledge of, any criminal scheme of, any kind involving Genesis Enterprises, Ltd." (Reply to Opposition to Section 1.65 Amendment and Petition for Waiver, Attachment A). And she further explained the significance of the filing fee checks that she signed for applications filed by Genesis for the lotteries involved in the fraudulent scheme. She indicated that she signed these checks, and many like them, as an officer of the company performing a nondiscretionary ministerial function. She compared herself to a bookkeeper or a check writing machine. The applicant stated that she was not aware of any difference in the number of checks she signed for the filing windows involved in the fraud as compared to other RSA filing windows. She also denied that she was aware of the balances in Genesis checking accounts.

37. Once again Nancy Naleszkiewicz addressed the concerns about her participation in the filing of Genesis' requests for inclusion of the unfiled applications in the lotteries. She stated that she played "virtually no role in the decision to file or in determining the contents of those pleadings." She acknowledged that she reviewed the final texts to assure that they were "consistent with the facts" known to her and that she determined that they were.

38. The applicant denied that Genesis had provided its clients with RSA applications without charge (other than the $200 filing fee). She stated that each client signed a Services Agreement and paid a fee based on several factors including the number of applications being filed. According to Nancy Naleszkiewicz, the plea agreement assumed that the charge for applications averaged $200 each and that is why it provides that $287,600 will be distributed to Genesis' victims to reimburse them for services not performed by Wladimir Naleszkiewicz. The applicant specifically denies that Genesis had an undisclosed interest in its clients' applications.

VI. THE WAIVER REQUESTS

39. The plea agreement provides that, subject to Commission approval, Nancy Naleszkiewicz will assign her construction permit for the Kansas 3 RSA, should it be awarded to her, to a trustee designated by the United States Attorney's Office. The trustee will then assign the permit to a buyer and will use most of the proceeds of the sale to recompense the Genesis victims. The plea agreement states that the parties to the agreement estimate that the construction permit will have a transfer value of between $2,000,000 and $5,000,000. Under the terms of the plea agreement, Nancy Naleszkiewicz is to receive from 15% of the proceeds of the sale (if less than $3,000,000) down to 10% of the proceeds (if it is more than $5,000,000) with intermediate percentages applying if the sale price is more than $3,000,000 and less than $5,000,000. By the terms of the plea agreement Nancy Naleszkiewicz is required to seek waiver of any applicable Commission rules necessary to carry out the agreement and she has filed a request for waiver of the anti-alienation provisions of Section 22.922 of the Commission's rules and certain other rule sections that apply to major amendments and cut-off procedures. In seeking the waiver, the applicant recognizes that the Commission cannot now act on the proposed assignment until a trustee is named and the Commission can evaluate his or her qualifications. She does, however, seek an indication as to whether the Commission will agree to the trustee concept in this case at this time.

40. Section 22.922 prohibits the sale, transfer, assignment or other alienation of an RSA application prior to the grant of a construction permit. The applicant recognizes that her agreement to assign the Kansas 3 construction permit "could be construed" to contravene these restrictions. In support of her waiver request she contends

that in consenting to the terms of the plea agreement she did not intend to evade the Commission's policies against alienation, trafficking or speculation in licenses. Rather, her motive was to use the only substantial asset available to make restitution to the injured Genesis clients. In this regard, she maintains that waiver would be consistent with the public interest as contemplated by Section 22.19 of the Commission's rules and would also be consistent with federal law which encourages restitution for criminal activity (18 U.S.C.§3663). She further contends that waiver will advance the purposes of the cellular radio service by facilitating a rapid resolution of pending matters and will help restore the integrity of the lottery process.

41. Pacific claims that the waiver request is procedurally defective because the applicant agreed to assign the permit to the trustee without having first obtained a waiver. Pacific also believes that a grant of the waiver would send the wrong signal to the mass producers of cellular applications who, if the instant waiver is granted, could henceforth argue that a questionable application should be granted because the preparer faces civil liability for fraudulent conduct. Pacific states there is no precedent for granting a waiver so that an applicant can pay off its business debts, especially debts that arise from fraudulent activities. Both the Committee and Pacific object to that part of the plea agreement that provides that Nancy Naleszkiewicz, who they view as an apparent wrongdoer, is to receive a portion of the proceeds of the sale of the construction permit. The Committee also objects to the proposed trust arrangement because Wladimir Naleszkiewicz, an admitted wrongdoer, will be indirectly benefited to the extent that his wife receives proceeds from the sale of the permit. The Committee maintains that the restitution plan unfairly penalizes the non-winning applicants for the Kansas 3 permit in order to repay the victims of the fraud. Also, the Committee states that the plea agreement proposal runs counter to Commission precedent that a license is not an asset or vested property interest and, therefore, cannot be the subject of a mortgage, lien or pledge.

42. In her response to the arguments made against granting the waiver request, the applicant states that she could not have sought action on the waiver request before the plea agreement was accepted by the court. She points out that the plea agreement, by its terms, is subject to the approval of the Commission to the extent that Commission approval is required before the provisions of the agreement may be carried out. The applicant also rejects the idea that the Commission is required to balance her interests against the interests of the non-winners. According to Nancy Naleszkiewicz, the statutory obligation of the Commission is simply to determine whether a grant of her application is in the public interest.

43. The Commenters support the waiver request. In "Comments in Support of Reply to Opposition to Amendment and Waiver Request" they urge the Commission to view the plea agreement as a determination by the United States Department of Justice that the waiver is in the public interest.

VII. DISCUSSION

A. The Waiver Requests

44. Nancy Naleszkiewicz has entered into a plea agreement pursuant to which she is required to prosecute her application and to file an application to assign the construction permit, if granted, to the trustee. She has requested waiver of the Section 22.922 anti-alienation rules and certain rules applicable to major amendments.

45. The instant case is clearly an unusual situation in which the applicant has entered into an agreement to assign a construction permit, if one is granted, in order to create a trust set up under the auspices of a U.S. Attorney's Office to compensate individuals who were apparently the victims of federal crimes committed by Wladimir Naleszkiewicz. No remedy is available at the Commission for these individuals since their applications were never properly filed. Their only other apparent remedy would be to sue Genesis in civil court for damages, a long and expensive process. The plea agreement and trust arrangement is a way of providing some degree of compensation for the victims in a timely and inexpensive manner. We disagree with the Committee that this arrangement is unfair to non-winning applicants. If Nancy Naleszkiewicz is qualified to hold the license, which is the only remaining issue in dispute and one which will be decided at hearing, the non-winning applicants would not have had any chance to be awarded this construction authorization. If the applicant is found to lack the requisite character qualifications, her application will be denied by the administrative law judge and a new lottery will be held among all other applicants. In these circumstances, non-winning applicants' rights will be protected.[2]

46. Given these public interest findings we believe that grant of a waiver of Section 22.922 is justified. In this case, the agreement to assign is not indicative of an intent to speculate in RSA applications or to subvert the Commission's licensing process. Further, grant of the waiver will not delay processing of the application any longer than other circumstances, such as the need for a hearing, would delay a final grant. Therefore, since the underlying circumstances justifying adoption of Section 22.922 are not present here, we grant the requested waiver.[3]

47. We wish to emphasize, however, that Nancy Naleszkiewicz will have to be found fully qualified to be a licensee in order for her application to be granted. Notwithstanding the grant of the waiver request, the Commission's qualification standards will not be lessened for this applicant. The crucial question to be resolved is whether Nancy Naleszkiewicz has the character qualifications to be a Commission licensee.

B. The Fraud Issue

48. Both Petitioners contend that Nancy Naleszkiewicz was involved in the conduct that resulted in the indictment of Wladimir Naleszkiewicz and Genesis and the conviction, pursuant to a plea agreement, of the former. They claim that as an officer of the company the applicant cannot avoid responsibility for the fraud. The applicant denies participation in or knowledge about the fraud. We are unable to conclude, on information before us, that Nancy Naleszkiewicz is qualified to be a Commission licensee. Her denials of participation or knowledge, which are quoted above, are general and conclusionary in

nature. Although she denies participating in a "criminal scheme" or a "scheme to defraud Genesis clients" she has failed to describe what she knew about the preparation and filing (or non-filing) of the applications for the two filing windows in question. Moreover, Genesis is not a large corporation and her position as an officer and her employment at the company make it impossible to conclude, without the benefit of a hearing, that the applicant is free of any knowledge or complicity in what occurred, particularly since she is also married to Wladimir.

49. We do not view the fact that she was not indicted as being dispositive of the matters in controversy. Nor do we view the language of the plea agreement granting her immunity from criminal prosecution as signaling that she was necessarily involved. We consider the fraud that was committed at Genesis to be a very serious matter directly relevant to an applicant's qualifications to be a Commission licensee, and we believe that a hearing is necessary to resolve questions about this applicant's responsibility for the fraud. We regard the conduct in question to be FCC related in that it involved wrongdoing associated with the Commission's lottery process and which ultimately involved misrepresentations to the Commission. Therefore, the Commission's general policy of not inquiring into alleged criminal conduct in the absence of a conviction in not a bar to inquiry into the applicant's possible involvement in the fraud. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), and *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990). The issues we will designate are not limited to those counts of the indictment to which Wladimir Naleszkiewicz pleaded guilty. Rather, the inquiry will encompass all the facts and circumstances that resulted in the non-filing of the applications and the extent, if any, of Nancy Naleskiewicz's participation in or knowledge of those events.

C. Misrepresentation

50. We are also concerned about the attempts made by Genesis to avoid responsibility for its failure to file its clients' applications. After the lottery notices appeared and the Genesis clients were not included on the lists of applicants who would be included in the lotteries, Genesis filed requests for inclusion in the lotteries in which it was alleged that the applications had been timely delivered to Federal Express and filed at the Commission's Pittsburgh filing facility. It is now apparent that the requests for inclusion contained blatant misrepresentations. The applicant indicates that she read the requests before they were filed to determine whether they were consistent with the facts as she knew them and that she determined that they were. Issues will be specified inquiring into the applicant's responsiblity, if any, for the misrepresentations made to the Commission in the inclusion requests. Also, inquiry will be authorized into whether the applicant misrepresented to the Commission the extent of her involvement in the fraud discussed in the prior section.

D. Multiple Applications

51. The Committee's request to designate an issue inquiring into whether Nancy Naleszkiewicz had ownership interests in more than one application in the Kansas 3 market in violation of Section 22.921(b) is denied. The factors urged by the Committee are insufficient to sustain its allegations that Nancy and Wladimir Naleszkiewicz, who each filed an application in the market, had undisclosed interests in each other's application. While it is true that they are husband and wife and were owners and officers of Genesis, these circumstances alone do not suggest that they had a secret agreement to jointly file two applications. Nancy Naleszkiewicz denies that there was such an agreement and since they both used the Naleszkiewicz name it is obvious that no attempt was made to disguise the fact that they both filed applications. Under these circumstances, there is no basis for determining that a sufficient issue has been raised warranting inquiry into this matter.

52. We should note at this point that although a statement was submitted by the applicant from Wladimir Naleskiewicz in which he denied that he had an interest in his wife's Kansas 3 application or that she had interest in his, no weight was given to that statement. That is because Wladimir Naleskiewicz submitted statements to the Commission in support of the Genesis requests for inclusion of the unfiled applications which, it has become apparent, were totally untrue. Therefore, we cannot accept statements from him at face value. He may, of course, testify in this proceeding where he will be available for cross examination and the Administrative Law Judge will be able to determine whether he is a credible witness.

E. Alienation of Interest

53. Pacific's claim that Nancy Naleszkiewicz either alienated or attempted to alienate an interest in her application is based on copies of a draft loan agreement between the applicant and an unidentified creditor. The document, which is not signed by either party, provides that the creditor will receive a 5% equity interest upon grant of the construction permit. The applicant acknowledges that she sent copies of the loan agreement to prospective creditors. However, she later received advice from counsel indicating that she should not enter into the agreement and she states that she heeded the advice. She denies that she violated the anti-alienation provisions of Section 22.922 since she never executed the agreement. There is no evidence that the applicant ever entered into a credit arrangement in which the creditor would receive an equity interest in the application. (The plea agreement does not suggest that anyone other than the applicant has an equity interest or the claim to one.) Therefore, the issue of whether this security agreement constituted an alienation of an interest in Nancy Naleszkiewicz's application will not be specified. In addition, we do not agree with Pacific that an "attempted" alienation, if that is what this amounts to, places the applicant's qualifications to hold a Commission license in issue.

F. Financial Issue

54. Pacific requests designation of a financial issue based on its assumption that Mr. and Mrs. Naleszkiewicz suffered a $300,000 loss when the unfiled applications were tendered for filing along with the requests for inclusion. This request is based totally on speculation and is rejected. There is no evidence whatsoever that the applicant's financial proposal has been put in jeopardy by the tendering of the applications (or by the plea agreement). Moreover, the premise of Pacific's request is not accurate. The checks that accompanied the applications that were tendered for filing when Genesis asked that they

be included in the lottery were not deposited by the Commission. Consequently, Pacific's challenge to the applicant's financial showing is rejected.

G. Real Party in Interest

55. Pacific's assertion that Genesis clients received their applications for nothing more than the $200 filing fee and that inquiry by the Commission is needed into whether Genesis and its clients were part of a real party in interest scheme is not convincing. The plea agreement provides for restitution to victims in amounts greater than the filing fees. Pacific has not submitted any evidence that would even tend to confirm its suspicions. A real party in interest issue will, therefore, not be specified.[4]

VIII. ORDERING CLAUSES

56. Wherefore, IT IS ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, that the application of Nancy Naleszkiewicz, File No. 10494-CL-P-430-A-89, IS DESIGNATED FOR HEARING upon the following issues:

1) to determine all the facts and circumstances surrounding the failure of Genesis to file its clients' RSA applications for the filing windows beginning on January 4, 1989, and January 11, 1989;

2) to determine all the facts and circumstances surrounding the filing by Genesis of the inclusion requests;

3) to determine from the evidence adduced above, the extent, if any, of Nancy Naleszkiewicz's involvement in these events;

4) to determine, based on the evidence adduced under Issues 1 through 3, whether Nancy Naleszkiewicz made or was involved in the making of material misrepresentations to the Commission or demonstrated a lack of candor; and

5) to determine, based on the evidence adduced pursuant to all the above, whether Nancy Naleszkiewicz possesses the requisite qualifications to be a Commission licensee and whether a grant of her application would be in the public interest.

57. IT IS FURTHER ORDERED that the hearing shall be held at a time and place before an Administrative Law Judge as specified in a subsequent Order.

58. IT IS FURTHER ORDERED that the Petition to Deny and Petition to Designate for Hearing are GRANTED to the extent indicated above and in all other respects are DENIED.

59. IT IS FURTHER ORDERED that the applicant's petition for leave to amend and its waiver request are GRANTED.

60. IT IS FURTHER ORDERED that Nancy Naleszkiewicz's Motion to Strike is DENIED.

61. IT IS FURTHER ORDERED that Commenters' motion to hold this proceeding in abeyance is DENIED and Pacific's Motion to Strike is DISMISSED as moot.

62. IT IS FURTHER ORDERED that Pacific Nationwide Cellular, the Committee for a Fair Lottery, and the Chief, Common Carrier Bureau are made parties to this proceeding. The Commenters did not file a timely Petition to Deny or otherwise submit the appropriate statements under oath which would warrant granting them party status. The rules permit them, however, to file a petition for leave to intervene before the Administrative Law Judge (see Section 1.223). The applicant and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary. The notice and other expedited procedures of Section 1.822(b) shall not apply in this case.

63. IT IS FURTHER ORDERED that because the information required to resolve the above specified issues is peculiarly within the knowledge of the applicant or her company, Genesis, the burden of proceeding as well as the burden of proof is placed on the applicant.

64. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Committee also filed a motion for leave to file the Supplement which is, hereby, granted.

[2] Nor do we agree with Pacific that the plea arrangements will somehow encourage application preparers to argue in favor of the grant of questionable applications on the basis that the grant will help them avoid civil liability for fraudulent conduct. The Kansas-3 application will not be granted unless Nancy Naleszkiewicz is found to be fully qualified. Further, the Committee's argument that the plea agreement violates Commission holdings that a license is not an asset which can be mortgaged or pledged is not on point. Holders of cellular construction permits are allowed to assign their authorizations, subject to Commission approval. *Bill Welch*, 3 FCC Rcd 6502 (1988). This is what the applicant proposes to do in this instance. The Commission will consider the assignment application if and when it is filed.

[3] We further conclude that waiver of the cut-off rules applicable to major amendments in not required. Nancy Naleszkiewicz has retained ownership of her application and is responsible for its prosecution. Her agreement to assign the permit, should it be granted, does not constitute a change in ownership or control which would invoke the cut-off rules.

[4] Commenter's request that this proceeding be held in abeyance pending the outcome of the criminal proceeding and possible civil litigation is denied. The criminal proceeding has resulted in a plea agreement and we are unaware of any civil litigation. Nor do we agree that the public interest would be served by further delay.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

Petition for Waiver

ORDER

Adopted: November 15, 1990; Released: November 16, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On November 8, 1990, MCI Telecommunications Corporation (MCI) filed a petition for waiver of the page limitation set forth in Section 1.429(d) of the Commission's Rules, 47 C.F.R. § 1.429(d), applicable to MCI's forthcoming petition for reconsideration of the Commission's *LEC Price Cap Order* (*Order*), released October 4, 1990.[1]

2. MCI states that because of the multiplicity and complexity of issues raised by the *Order*, it will not be possible to discuss adequately all of the points that need to be reconsidered in 25 pages. MCI further states that the *Order* is 414 paragraphs and 193 pages long, not including 18 pages of regulations to effectuate the *Order* and five other Appendices, which contain detailed and complex formulas to be used in calculating the elements of the price cap plan. MCI requests that the page limit be set at not less than 75 pages.

3. We conclude that good cause has been shown to grant, in part, MCI's request for waiver of Section 1.429(d). We will grant a waiver to enable MCI or any other petitioner to file a petition for reconsideration, that does not exceed 40 pages in length.

4. Accordingly, IT IS ORDERED that the petition for waiver filed by MCI Telecommunications Corporation IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief,
Common Carrier Bureau

FOOTNOTE

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 55 FR 42375, released Oct. 19, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HOUSTON CELLULAR TELEPHONE COMPANY — File No. 02785-CL-MP-89

For authority to modify station KNKA 367 operating on Frequency Block A in the Houston, Texas, Market No. 10A Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1990; Released: November 28, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On March 1, 1989, Houston Cellular Telephone Company ("HCTC"), a licensee, applied to modify its existing Cell 34 of station KNKA367, operating on frequency Block A in the Houston, Texas Metropolitan Statistical Area (MSA). The modification proposed an extension into an adjacent Rural Service Area (RSA), Market No. 672, Texas 21-- Chambers. On May 15, 1989, GTE Mobilnet of South Texas Limited Partnership ("GTE") filed a petition to deny HCTC's application. On June 2, 1989, Mobilnet filed an opposition to HCTC's petition. On June 14, 1989, GTE filed a reply.

II. BACKGROUND AND CONTENTIONS

2. In its application, HCTC proposes to modify the antenna and existing power level of its existing cellular facility for the purpose of improving the quality of service to customers in the Houston MSA. GTE alleges that HCTC's application proposes an extension into an adjacent RSA in contravention of Section 22.903 (a) of the Commission's rules, 47 C.F.R. §22.903(a).

3. GTE calculates that the extension of HCTC's cell site 34 beyond the MSA is 19.8% of the area covered by the cell, and that the proposed 39 dBu contour intrudes up to 60 miles into the RSA. GTE is concerned that the extension will give HCTC an unfair advantage because the HCTC extension will be much larger than the GTE extension into the same area.[1] GTE argues that since it has been able to minimize its extension into the RSA it is not credible that HCTC is unable to similarly minimize its extension.

4. In its reply, HCTC contends that its minor extension of the 39 dBu contour of cell site 34 is necessary to provide coverage to previously unserved portions of the Houston MSA as well as to upgrade areas currently receiving marginal signals. It argues that the 19.8% extension of the service contour is *de minimis* and notes that an extension of 22% was approved in *Advanced Mobile Phone Service, Inc.*[2] HCTC further argues that its proposed extension is justified because of the irregular shape of the MSA and the difficulty of producing adequate signal penetration in an area which has a large number of buildings and trees at its border. HCTC asserts that the proposed extension has been minimized by building the cell site five miles from the MSA border, using directional antennas, and reducing power in an attempt to keep its predicted 39 dBu contour entirely within the MSA. Moreover, HCTC proposes to change to omnidirectional antennas and to operate at reduced power, arguing that this will limit the extension into RSA Texas-21 to 62 square miles of rural area, or approximately 19.8% of Cell 34's proposed 39 dBu contour.

III. DISCUSSION

5. In *Procedures Update*, [3] and in Section 22.903(a) of the rules,[4] the Commission established guidelines for configuring 39 dBu contours. The Commission has stated that 39 dBu contours should be contained entirely within the MSA or NECMA but that any *de minimis* extension beyond the CGSA would not render an application defective if the application included a specific explanation of why it was necessary to engineer the particular cells if the 39 dBu contours could not be contained within the SMSA or NECMA. In analyzing applications which propose extensions of the 39 dBu contours, we determine whether the extension is *de minimis* and, if so, we then determine whether there is a specific engineering explanation for the extension. A variety of factors are taken into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. The proposed extension in this case amounts to about 19.8 percent of Cell 34's contour and, based on other comparable situations, appears to constitute no more than a *de minimis* extension as contemplated by our rules and policies.[5] Moreover, the extension does not cover major population centers.[6] HCTC explains that although the 39 dBu contours were designed to provide service to the MSA itself, it is impossible to design a cell that will provide adequate coverage to its population centers and major highways. The extension area encompasses a highway leading up to a city within the MSA, over which HCTC indicates its customers require more reliable service. Moreover, the MSA boundary separating Houston is of an irregular shape and it is uncontroverted that the combination of trees and buildings in the MSA may prevent the actual signal strength from covering the entire area estimated by the Carey formula. The alternative propogation estimate offered by HCTC now takes into account the reduction in coverage due to trees and buildings. HCTC also proposes to take several steps in engineering the site to minimize the extension, including using an omnidirectional antenna and operating at reduced power from the normal maximum allowed.

6. Based upon the explanation offered, including HCTC's commitment to provide service only to the city of Baytown as well as along a major route within the MSA, we conclude that the extension is *de minimis* and is acceptable. In addition, we find HCTC fully qualified to

effectuate its proposals and that granting the instant application to make modifications to cellular station KNKA 367 would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED that the application (File No. 02785-CL-MP-89) of Houston Cellular Telephone Company is authorization does not include the right to any interference protection in any areas outside the Houston, Texas MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

8. IT IS FURTHER ORDERED that the Petition to Deny filed by GTE Mobilnet of South Texas Limited Partnership is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] GTE's argument that HCTC's proposal would give HCTC an unfair competitive advantage over GTE in the Houston Market is unsupported. On February 21, 1989, GTE was granted a similar, albeit smaller, extension into the Chambers RSA. However, since HCTC's proposed extension is *de minimis* the variance in size between HCTC's proposed extension and GTE's extension is inconsequential. Moreover, introduction of service in the same area by an additional provider will foster fair competition. *See also GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd. 1657 (Mob. Serv. Div. 1989).

[2] 54 Rad. Reg. 2d (P&F) 531 (Com. Car. Bur. 1983).

[3] 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd., Cellular Radio Service*, 56 Rad. Reg. (P&F) 1583 (1984).

[4] Section 22.903(a) states in pertinent part:

> The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes area within a Metropolitan Statistical Area (MSA), or in New England, A New England Country Metropolitan Area (NECMA), as modified in paragraph (e) of the section, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA . . .

[5] *Advanced Mobile Phone Service, Inc., supra.*

[6] *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-348

In re Applications of

HARRY NELSON (hereafter "Nelson") — File No. BPH-890524MI

DEVAUGHN TOOLE AND MARY L. TOOLE d/b/a TOOLE & COMPANY, A GENERAL PARTNERSHIP (hereafter "Toole") — File No. BPH-890530MH

EUFAULA BROADCAST ASSOCIATES (hereafter "EBA") — File No. BPH-890530MO

For Construction Permit for a New Commercial FM Station on Channel 250A in Eufaula, Alabama

ERRATUM

Adopted: November 15, 1990; Released: November 28, 1990

By the Chief, Audio Services Division:

The *Hearing Designation Order* in MM Docket No. 90-348, DA 90-1013 (released September 4, 1990) erroneously specified the subject Eufaula, Alabama channel allotment as 251A rather than the proper Channel 250A. The *Order* is hereby modified to correct this information.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 28, 1990

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not published in the FCC Record (*See* 0.445(a) of the rules).

These decisions are available for public inspection. Periodically, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

Group Three W, Inc. - This is a correction to a previously issued Public Notice. The refund amount should have been $6,760.00 instead of $6,000.

Carlinville Broadcasting Corporation - Request for a refund of a $6,760.00 hearing fee for a new FM station at Carlinville, Illinois - **Granted** (September 4, 1990)

Columbia Communications Corporation - Request for Declaratory Ruling and Fee Refund of $4,060 in construction fees - **Denied** (October 1, 1990)

Holder Communications Corporation - Request for a refund of a hearing fee in connection with its application to upgrade KHLA-FM, Lake Charles, Louisiana - **Denied** (September 28, 1990)

Keith, Tim - Petition for reconsideration re waiver of the filing fee for a license in Spokane, Washington in the Private Land Mobile and General Mobile Radio Services - **Denied** (September 27, 1990)

Komorowski, Patricia Benns - Request for refund of a $6,000.00 hearing fee for a license for a FM Station at Los Lunas, New Mexico - **Granted** (September 27, 1990)

Payne, Emalee C. - Request for a refund of a $6,000.00 hearing fee for a new FM station at Elk Mound, Wisconsin - **Denied** (September 28, 1990)

Williams, Lester L. - Reconsideration of a request for a refund of a $6,000 hearing fee for a new radio station at Moneta, Virginia - **Denied** (October 18, 1990)

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, ACTING CHIEF, FEE SECTION ON 632-0241.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-498

In the Matter of

Amendment of Section 73.202(b), RM-6916
Table of Allotments,
FM Broadcast Stations.
(Bethany Beach, Delaware)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. Pursuant to the request of Alfred R. Campagnone (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8121 (1989), proposing the allotment of Channel 278A to Bethany Beach, Delaware, as that community's second FM service. Aris Mardirossian and SCS Broadcasting filed supporting comments stating their intentions to apply for the channel, if allotted. Musicradio of Maryland, Inc. ("Musicradio"), licensee of radio Station WOCQ(FM), Berlin, Maryland, also filed comments.

2. In its comments, Musicradio states that under the distance separation requirements in effect prior to the effective date of the *Second Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989), the Bethany Beach proposal fully met the separation requirements with respect to its Station WOCQ(FM) Berlin, Maryland. Musicradio contends that there is now a 2.4 kilometer short-spacing for 6 kW operation between Station WOCQ's licensed site and the reference coordinates for Bethany Beach. Musicradio argues that absent an agreement between Station WMGM, Atlantic City, New Jersey, Station WESR, Onley-Onancock, Virginia, and its own Station WOCQ, Berlin, Maryland, the Bethany Beach station could not operate at greater than 3 kW. For this reason, Musicradio suggests that the allotment to Bethany Beach be made on the condition that any eventual permittee will be deemed to have agreed that Station WOCQ may increase to 6 kW.

3. Musicradio's concerns regarding a 2.4 kilometer short-spacing between Station WOCQ's licensed site and the Bethany Beach proposal are without merit, because the Bethany Beach petition was filed and processed under the "old" separation requirements. *See Second Report and Order*, supra. The allotment of Channel 278A at Bethany Beach meets the minimum distance spacing requirements of the Commission's Rules.[1] Therefore, Musicradio is not entitled to any protection at the allotment stage. Furthermore, we find no basis for imposing the condition which Musicradio requests.

4. Based on the information before us, we believe that the public interest would be served by allotting Channel 278A to Bethany Beach, Delaware, as that community's second local FM service. As stated in the *Notice*, Channel 278A can be allotted to Bethany Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bethany Beach, Delaware	240A, 278A

6. The window period for filing applications will open on **January 14, 1991,** and close on **February 13, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Because this petition was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

[2] The coordinates for Channel 278A at Bethany Beach are North Latitude 38-32-22 and West Longitude 75-03-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-577

In the Matter of

Amendment of Section 73.202(b),	RM-7507
Table of Allotments,	
FM Broadcast Stations.	
(Georgetown, Kentucky)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Kentucky Radio Limited Partners (petitioner), licensee of Station WTKT(FM), Channel 276A, Georgetown, Kentucky. Petitioner requests the substitution of Channel 277A for Channel 276A at Georgetown, and modification of the license for Station WTKT(FM) to specify operation on Channel 277A. Petitioner states that it will apply for the channel, if allotted.

2. In support of its proposal, petitioner states that Station WTKT operates on Channel 276A as a grandfathered 3 kW facility. It is unable to increase its power to 6 kW due to short-spacings to Station WKRA, Channel 276A, St. Matthews, Kentucky, and Station WRAC, Channel 276A, West Union, Ohio. The substitution of Channel 277A for Channel 276A at Georgetown, argues petitioner, will eliminate these short-spacings.

3. An engineering analysis has determined that Channel 277A can be substituted for Channel 276A at Georgetown in compliance with the Commission's minimum distance separation requirements at Station WTKT's current licensed site, with a site restriction of 10.8 kilometers (6.7 miles) south[1] of the community.

4. We believe the public interest would be served by proposing the substitution of Channel 277A for Channel 276A at Georgetown since this will enable Station WTKT to expand its service area. Also, as requested, we propose to modify the license of Station WTKT(FM) to specify operation on Channel 277A in lieu of Channel 276A. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Georgetown, Kentucky	276A	277A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Linda J. Eckard
Mark N. Lipp
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 277A at Georgetown are North Latitude 38-06-57 and West Longitude 84-31-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-578

In the Matter of

Amendment of Section 73.202(b), RM-7492
Table of Allotments,
FM Broadcast Stations.
(Mount Vernon, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Pathways Broadcasting (petitioner), requesting the allotment of Channel 244A to Mount Vernon, Illinois, as that community's third local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. An engineering analysis reveals that Channel 244A can be allotted to Mount Vernon in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.3 kilometers (0.8 miles) northwest[1] of the community. The site restriction is necessary in order to avoid a short-spacing to Station WRUL, Channel 247B, Carmi, Illinois.

3. We believe the public interest would be served by proposing the allotment of Channel 244A to Mount Vernon, Illinois, because this would provide the community with its third local FM service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Mount Vernon, Illinois	231B, 271B1	231B, 244A, 271B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stanley G. Emert, Jr.
Lockridge & Becker, P.C.
P. O. Box 107
Knoxville, Tennessee 34401
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 244A at Mount Vernon are North Latitude 38-19-28 and West Longitude 88-55-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-157

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Show Low, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), issued on its own motion, proposing, *inter alia*,[1] the reclassification of Station KVWM-FM, Channel 228A, Show Low, Arizona, to Channel 228C3 and modification of the license issued to Dorothy Litchfield Woodworth ("Woodworth") to specify the higher powered channel. Woodworth filed comments in support of the proposal. The Federal Aviation Administration ("FAA") also filed comments.[2] No other comments were received.

2. We believe the public interest would be served by substituting Channel 228C3 for Channel 228A at Show Low, Arizona, since it would enable Station KVWM-FM to provide expanded coverage FM service to the community. Therefore, we will authorize a modification of the license for Station KVWM-FM to specify operation on Channel 228C3 in lieu of Channel 228A. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984), and Section 1.420(g) of the Commission's Rules.

3. Channel 228C3 can be allotted to Show Low consistent with the minimum distance separation requirements of the Commission's Rules, and can be used at the licensed transmitter site of Station KVWM-FM.[3] Additionally, since Show Low is located within 320 kilometers (199 miles) of the Mexican border, the Commission obtained Mexico's concurrence in the proposal.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Show Low, Arizona	228C3, 243C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Dorothy Litchfield Woodworth for Station KVWM-FM, IS MODIFIED effective **January 11, 1991,** to specify operation on Channel 228C3 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* proposed to amend the FM Table of Allotments for 149 FM stations at various locations throughout the United States and territorial possessions by reclassifying their operations from a Class A to Class C3, and proposed modifications of each stations' authorization accordingly. The reclassification under consideration herein for Station KVWM-FM at Show Low, Arizona, is one of those proposals.

[2] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded other, similar proceedings. 5 FCC Rcd 2152, n.4.

[3] Coordinates at the licensed site of Station KVWM-FM are 34-13-14 and 110-01-49. Because this allotment is made as a result of a proposal announced prior to October 2, 1989, the minimum distance separation requirements are based on the provisions of § 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-579

In the Matter of

Amendment of Section 73.202(b), RM-7065
Table of Allotments,
FM Broadcast Stations.
(Big Rapids and Whitehall,
Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8709 (1989), proposing the substitution of FM Channel 272C3 for Channel 272A at Big Rapids, Michigan. The *Notice* was issued in response to a petition filed by West Michigan Radio, Inc. (petitioner).[1] Petitioner also requested modification of its license for Station WAAQ(FM) to specify operation on the higher class channel. To accommodate this proposal, petitioner requested the substitution of Channel 248A for Channel 273A at Whitehall, Michigan. Petitioner filed comments reaffirming its interest in Channel 272C3 at Big Rapids. No other comments were filed.

2. We believe the public interest would be served by the substitution of FM Channel 272C3 for Channel 272A at Big Rapids, since it could provide the community with a wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 3 kilometers (1.8 miles) southeast of the community.[2] As indicated in the *Notice*, the Big Rapids substitution requires the substitution of Channel 248A for Channel 273A at Whitehall, Michigan. At the time the *Notice* was issued, two applications were on file for the channel at Whitehall. [3] The Commission has since granted the application of Pyramid Broadcasting, Inc., for a construction permit for the channel. *See Pyramid Broadcasting, Inc.* (MM Docket No. 90-328), released September 13, 1990, and *Erratum* (MM Docket No. 90-328), released October 26, 1990. Channel 248A can be allotted to Whitehall in compliance with the Commission's spacing requirements at the site specified in Pyramid Broadcasting's application for Channel 273A.[4] Since Big Rapids and Whitehall, Michigan, are located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained for these allotments. We shall also modify the license of Station WAAQ(FM) to specify operation on Channel 272C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Big Rapids, Michigan	265A, 272C3
Whitehall, Michigan	237A, 248A

4. IT IS FURTHER ORDERED that, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Station WAAQ(FM), Big Rapids, Michigan, IS MODIFIED to specify operation on Channel 272C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED that, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the construction permit (BPH-880915MY) for Channel 273A, Whitehall, Michigan, granted to Pyramid Broadcasting, Inc., IS MODIFIED, effective **January 11, 1991,** to specify operation on Channel 248A in lieu of Channel 273A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in construction permit BPH-880915MY except the channel as specified above. Any other changes, except those so specified under Section 73.6120 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with construction in permit BPH-880915MY except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the following:

Pyramid Broadcasting, Inc.
1802 S. Fernandez Avenue
Arlington Heights, Illinois 60005

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An assignment of license for Station WAAQ(FM) from James J. McCluskey to West Michigan Radio, Inc., was consummated on October 9, 1989 (BALH-890630GR).

[2] The coordinates for Channel 272C3 at Big Rapids are 43-43-20 and 85-36-30.

[3] Pyramid Broadcasting, Inc. (BPH-880915MY), and P&B Communications, Inc. (BPH-880915NP) filed applications for the channel.

[4] The coordinates for Channel 248A at Whitehall are 43-23-04 and 86-19-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-579

In the Matter of

Amendment of Section 73.202(b), RM-7330
Table of Allotments,
FM Broadcast Stations.
(Pasco, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 28, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Thomas W. Read, d/b/a West Pasco Fine Arts Radio (petitioner), permittee of Station KUKE(FM), Channel 267A, Pasco, Washington, seeking the substitution of Channel 267C3 for Channel 267A at Pasco and modification of the permit to specify operation on the higher powered channel. Petitioner stated a commitment to apply for Channel 267C3 if it is allotted.

2. A staff analysis has determined that Channel 267C3 can be allotted to Pasco at petitioner's current site,[1] located 7.3 kilometers (4.5 miles) west of the community, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. However, since Pasco is located within 320 kilometers (200 miles) of the United States-Canadian border, the Commission must obtain concurrence by the Canadian government in the proposal.

3. We believe the public interest would be served by this proposal since it could provide Pasco with an expanded coverage FM service. Moreover, since petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the facilities of Station KUKE(FM) without entertaining other expressions of interest.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Pasco, Washington	252A, 267A	252A, 267C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 22, 1991,** and reply comments on or before **February 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Howard J. Barr, Esq.
Neal J. Friedman, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20554

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the site specified in the construction permit issued for Station KUKE(FM) at Pasco are 46-13-16 and 119-11-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-588

In the Matter of

Amendment of Section 73.202(b), RM-7522
Table of Allotments,
FM Broadcast Stations.
(Jackpot, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1990; Released: November 29, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Dale A. Ganske (petitioner) requesting the allotment of Channel 253A to Jackpot, Nevada, as its first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Petitioner states that Jackpot is an unincorporated community located on the Nevada-Idaho border, with a 1980 U.S. Census population of 500 persons. Petitioner states that, according to the Nevada Commission on Tourism, Jackpot's population has now grown to approximately 2,000 persons. He also submits that Jackpot has three hotel-casinos, a county-owned golf course, tennis courts, a municipal swimming pool, an airport, a bi-monthly newspaper (*The Jackpot Review*) and is currently building a local high school.

3. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Contrary to petitioner's assertion, Jackpot is not listed in the 1980 U.S. Census.[1] Although petitioner provides information that there is a bi-monthly newspaper which identifies itself with Jackpot, as well as several recreational facilities, he provides no information as to any social, economic, governmental or cultural organizations that identify themselves with Jackpot. Therefore, the petitioner should present the Commission with further information to demonstrate that Jackpot has social, economic, cultural, and governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

4. We believe the public interest would be served by proposing the allotment of Channel 253A to Jackpot, Nevada, since it could provide a first local service if Jackpot is ultimately found to be a community for allotment purposes. Channel 253A can be allotted to Jackpot in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jackpot, Nevada	--	253A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 22, 1991**, and reply comments on or before **February 6, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dale A. Ganske
1819 Mitchell Avenue
Eau Claire, Wisconsin 54701
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Jackpot is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 500 persons. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for Channel 253A at Jackpot are North Latitude 41-59-06 and West Longitude 114-40-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-334

In the Matter of

Amendment of Section 73.202(b), RM-7341
Table of Allotments,
FM Broadcast Stations.
(Sweet Home, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 7, 1990; Released: November 29, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Galaxy Broadcast Partners ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 4532 (1990), proposing the substitution of Channel 296C1 for Channel 296C2 at Sweet Home, Oregon, and the modification of the construction permit of Station KSKD to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 296C1 for Channel 296C2 at Sweet Home, since it could provide the community with expanded radio service. Channel 296C1 can be allotted to Sweet Home in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KSKD's construction permit.[1] As proposed, we will also modify Station KSKD's construction permit to specify operation on Channel 296C1 in lieu of its present Channel 296C2, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 14, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sweet Home, Oregon	296C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station KSKD, Sweet Home, Oregon, IS MODIFIED to specify operation on Channel 296C1, in lieu of Channel 296C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 296C1 at Sweet Home are North Latitude 44-29-02 and West Longitude 122-34-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COAST TV	**MM DOCKET NO. 84-934** File No. BPCT-840720KG
MISSION BROADCASTING CORPORATION	**MM DOCKET NO. 84-935** File No. BPCT-840723KI
SOLAR TELEVISION, INC.	**MM DOCKET NO. 84-936** File No. BPCT-840723KJ

For Construction Permit
Santa Barbara, California

ERRATUM

Released: November 30, 1990

FCC 90R-107, released November 16, 1990, is corrected to reflect the following Docket Numbers: Coast TV, MM Docket No. 84-934; Mission Broadcasting Corporation, MM Docket No. 84-935, and Solar Television, Inc., MM Docket No. 84-936.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 29, 1990

VIRGIN ISLANDS TELEPHONE CORPORATION SEEKS RECONSIDERATION OF COMMON CARRIER BUREAU DECISION REGARDING THE PROPER ACCOUNTING TREATMENT OF CERTAIN INTEREST EXPENSE UNDER PARTS 32 AND 64 OF THE COMMISSION'S RULES

Pleading Cycle Established

On November 15, 1990, the Virgin Islands Telephone Corporation (Vitelco), by its attorneys, filed a petition for reconsideration of a Common Carrier Bureau Order released on October 15, 1990.[1] In this Order, the Bureau ruled that the interest expense relating to a loan from the Rural Telephone Finance Cooperative (RTFC) to purchase the stock of Vitelco must be included in the computation of Federal Income Taxes (FIT) for the purpose of determining interstate revenue requirements and that Vitelco may not offset the interest income from RTFC Subordinated Capital Certificates against the interest expense on the RTFC loan.

Vitelco claims that the Bureau decision creates an unwarranted double windfall for ratepayers. Vitelco requests that the Bureau reconsider its decision and rule that the interest expense related to the RTFC loan should not be included in the determination of the interstate FIT for ratemaking purposes. If the Bureau still considers that the RTFC interest expense must be included in the FIT calculation, according to Vitelco, it should at least reconsider its decision that the interest income for the RTFC Subordinated Capital Certificates may not be offset against the interest expense.

Parties wishing to file oppositions to Vitelco's petition should do so no later than **December 28, 1990.** Petitioner's replies should be filed no later than **January 22, 1991.**

Parties are requested to serve copies of the comments upon International Transcription Services, Inc. at their offices in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and upon Kenneth P. Moran, Chief, Accounting and Audits Division, Room 812, 2000 L Street, N.W., Washington, D.C. 20554. Parties should refer to File No. AAD 90-19.

Copies of the petition and related documents may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. The documents are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Debra A. Weber at (202) 634-1861.

FOOTNOTE

[1] *Memorandum Opinion and Order*, Virgin Islands Telephone Corporation Request for Declaratory Ruling Concerning Proper Accounting Treatment for Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules. DA 90-1413 (released October 15, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Continental Cablevision
of New Hampshire, Inc.
Complainant,

v. File No. PA-82-0074

Concord Electric Company
Respondent.

ORDER

Adopted: November 26, 1990; Released: November 30, 1990

By the Chief, Accounting and Audits Division:

1. On October 20, 1982, Continental Cablevision of New Hampshire, Inc., filed the above-referenced complaint pursuant to Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, seeking a determination that the Concord Electric Company had imposed unjust and unreasonable rates for cable television pole attachments. The Common Carrier Bureau, on June 28, 1985, issued an order directing Concord to reduce its pole attachment rates. Consequently, Concord Electric filed an Application for Review of the Bureau's action on August 15, 1985.

2. This matter was deferred pending issuance of amended rules for processing pole attachment rate complaints. *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987).

3. By letter dated July 27, 1988, counsel for Continental Cablevision of New Hampshire, Inc., advised the Commission that its client desired to drop its complaint. In addition, counsel for Concord Electric by letter dated May 9, 1989, informed the Commission that since Continental Cablevision of New Hampshire, Inc., withdrew its complaint, Concord Electric's Application for Review is moot and thus, need not be considered by the Commission.

4. Since no Commission action is necessary, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and authority delegated by Section 0.291 of the Commissions Rules, 47 C.F.R. § 0.291, that the complaint filed by Continental Cablevision of New Hampshire, Inc., IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-418

In re Applications of

KRIZ BROADCASTING, INC. (hereafter "KRIZ")	File No. BPH-890410MB
Q PRIME INC. (hereafter "Q Prime")	File No. BPH-890411MA
FORT VANCOUVER BROADCASTING, INC. (hereafter "Fort")	File No. BPH-890412MB
SMITH BROADCASTING, INC. (hereafter "Smith")	File No. BPH-890412MC
ATWATER KENT COMMUNICATIONS, INC. (hereafter "Atwater")	File No. BPH-890412MD2
COLUMBIA RIVER WIRELESS, INC. (hereafter "Wireless")	File No. BPH-890412MF
FLORINDA J. WEAGANT (hereafter "Weagant")	File No. BPH-890412MI
MCCOY COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "McCoy")	File No. BPH-890413MA
KLRK, INC. (hereafter "KLRK")	File No. BPH-890413MC
VANCOUVER COMMUNICATIONS CO. (hereafter "Vancouver")	File No. BPH-890413ME
GREGORY WINSTON (hereafter "Winston")	File No. BPH-890413MF
TURNBEAUGH COMMUNICATIONS, L.P. (hereafter "Turnbeaugh")	File No. BPH-890413MG
THOMAS M. EELLS (hereafter "Eells")	File No. BPH-890413MH
CLARK BROADCASTING LIMITED PARTNERSHIP (hereafter "Clark")	File No. BPH-890413MJ
BERNARD V. FOSTER (hereafter "Foster")	File No. BPH-890413MK
VANCOUVER FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "Limited")	File No. BPH-890413ML
LINDA AND JACK SEXTON (hereafter "Sexton")	File No. BPH-890413MN
THE VANCOUVER RADIO GROUP, INC. (hereafter "Group")	File No. BPH-890413MV
COLUMBIA-WILLIAMETTE LIMITED PARTNERSHIP (hereafter "CWLP")	File No. BPH-890413MW
VANCOUVER-PORTLAND BROADCASTING CORPORATION (hereafter "VPBC")	File No. BPH-890413MX
(James A. Gammon d/b/a) REUNION BROADCASTING SERVICE (hereafter "Reunion")	File No. BPH-890413MY

(John Q. Hearne d/b/a) POINT BROADCASTING COMPANY (hereafter "Point")	File No. BPH-890413MZ
CASCADE BROADCASTING OF VANCOUVER LIMITED PARTNERSHIP (hereafter "Cascade")	File No. BPH-890413NB
SHABAZ COMMUNICATIONS, INC. (hereafter "Shabaz")	File No. BPH-890413NC
VANCOUVER USA BROADCASTERS, INC. (hereafter "Broadcasters")	File No. BPH-890413ND
COLUMBIA FM LIMITED PARTNERSHIP (hereafter "CFMLP")	File No. BPH-890413NH
(Andrew L. Brown & Lester M. Friedman) d/b/a) TRANS-COLUMBIA COMMUNICATIONS (hereafter "Trans-Columbia")	File No. BPH-890413NL
COLUMBIA RIVER BROADCASTING COMPANY (hereafter "CRBC")	File No. BPH-890413NN

For Construction Permit for a New FM Station on Channel 290C2 (105.9 MHz) in Vancouver, Washington

HEARING DESIGNATION ORDER

Adopted: September 13, 1990; Released: November 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* Each of the captioned applications is short-spaced to the licensed (File No. BLH-810511AL) first-adjacent channel (291C) facilities of KFAT (FM), (Corvallis, Oregon). No waiver of the rules is required, however, since KFAT's license has been modified to specify operation on Channel 292C in lieu of Channel 291C pursuant to the *Report and Order* in MM Docket 87-523, 4 FCC Rcd 839 (1989). Therefore, program tests for the eventual permittee in the instant proceeding may not commence until FM Station KFAT commences operations on Channel 292C.

3. *Turnbeaugh.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Turnbeaugh has not completed Item 4 correctly, providing only a street address for its principal, Keith N. Cripps. Accordingly, Turnbeaugh must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *Limited.* Roanoke Valley Telephone Cellular Company ("RVCTC") is the limited partner in Limited. Mr. Billy J. Parrott, president and sole shareholder of RVCTC, is also president, director and 42.3% shareholder in Private Networks, Inc. ("PNI"). In turn, PNI is 51% partner in PN Radio Company. The remaining 49% of PN Radio Company is held by Broadcast Data Corp., a wholly-owned subsidiary of Graphic Scanning Corp.

5. In an action relative to the parent of PNI's partner in PN Radio Company, Graphic Scanning Corp., by Order released August 24, 1982, the Commission designated for hearing applications filed by A.S.D. Answer and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party in interest in the applicants. In an *Initial Decision* released January 5, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party in interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and, on occasion, intentionally misrepresented material facts to the Commission.

6. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion and Order* released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the *Initial Decision*. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct were to regain control of Graphic. *A. S. D. Answer Service, Inc. et al.*, 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

7. We also note that an affiliate of Broadcast Data Corp.'s parent company, Graphic Scanning Corp., has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.*, (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal anti-trust laws. *See e.g., Meridian*

Communication, 2 FCC Rcd 3630 (1987). An appropriate condition will therefore be specified below. Finally, a complaint has been filed by the Securities and Exchange Commission in the United States District Court for the Southern District of New York alleging the filing with the SEC of certain false, misleading and untimely statements concerning investment made in Graphic Scanning Corp. by Amster & Co., Arnold Marvin Amster, Barry Stuart Lafer and Joel R. Packer in 1987. An appropriate condition will be specified below concerning this matter.

8. *Sexton*. In their tendered application, Linda and Jack Sexton stated that they proposed to place their transmitting antenna on the existing KMJK-FM tower on Mt. Scott, Oregon. The Sextons stated that reasonable assurance of the availability of this site had been obtained from James Boyd, described in Section VII of their application as the "lease holder" of the site. Our study of the other proposals for the KMJK tower indicates that assurances were received in those applications from KMJK's general manager, Dave McDonald. The Sextons have not demonstrated how Mr. Boyd as lease holder possesses control of KMJK's site to the degree that his assurance of availability may be construed as reasonable. A site availability issue must therefore be specified in this instance.

9. *Cascade*. On July 31, 1989, Cascade amended its application as of right to change its organizational structure from a general partnership to a limited partnership, with Irmatine C. Chastang functioning apparently as the sole general partner in this structure. Cascade failed to specify Ms. Chastang's equity interest in this amended organizational structure, and will therefore be required to file the appropriate amendment with the presiding Administrative Law Judge.

OTHER MATTERS

10. *RF / Environmental*. Fort, Atwater, Wireless, Group and CRBC propose to locate their respective antennas on or near the existing KMJK-FM tower. KRIZ proposes to situate its transmitting antenna on the tower currently used by KBMS (AM). KLRK proposes to construct a new tower on Prune Hill, approximately 2.8 kilometers Northeast of the Camas, Washington City Hall. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals noted above may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each of the specified applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. For those applicants proposing to locate on or near the KMJK-FM tower, those studies must include the effects of television translator K34DA (Portland, Oregon) and, if applicable, television translator K56EI (Portland, Oregon). If the sites proposed are presently fenced in compliance with the guidelines, the applicants must so state and give the distance from the base of the tower to the fence. Accordingly, KRIZ, Fort, Atwater, Wireless, Group, KLRK and CRBC will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the applicants' environmental assessments, that any or all of the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* Section 1.1308(d) of the Commission's Rules.

11. *Air Hazard*. KRIZ (on November 2, 1989) and Wireless (on December 19, 1989) have amended their respective applications to indicate that the Federal Aviation Administration has determined that their proposed facilities may have an adverse effect on that agency's navigational aid facilities and cause interference with aircraft navigational receivers during final approach and landing at Portland, Oregon Airport.[1] Further, Atwater indicated that it proposed to place its transmitting antenna on an existing 31-meter tower on top of Mount Scott in Happy Valley, Oregon. However, the latitude specified in Atwater's application (45 degrees-27 minutes-18 seconds) differs slightly from that found in our Antenna Survey Branch records (45 degrees-27 minutes-17 seconds). Atwater stated that the coordinates listed in its application "were supplied by the licensee of WNIN-894 and have been independently verified." *Atwater Application*, at Part 3.0 of Engineering Statement. However, Atwater has not filed this correction with the Federal Aviation Administration and, therefore, an air hazard issue must be specified. Finally, our attempts to obtain FAA clearance for Weagant, KLRK, Broadcasters and Trans-Columbia through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, an issue must be specified.

12. *Engineering Discrepancies*. Our examination of the captioned applications reveals the following technical deficiencies:

(a) Fort and Wireless state in Section V-B, Item 3 of their respective applications that they propose to construct their transmitting antennas on KMJK-FM's existing tower. Our research indicates discrepancies in the antenna heights above ground level (AGL) and mean sea level (AMSL) between those listed in their applications (46 meters AGL/377 meters AMSL) and those found in our Antenna Survey Branch records for KMJK-FM (47.2 meters AGL/378 meters AMSL).

(b) The engineering portion of Reunion's application proposes operation with 2.0 kilowatts effective radiated power (ERP) at 648 meters antenna height above average terrain (HAAT). However, the staff has determined that, in order to comply with 47 C.F.R. § 73.211, the maximum ERP for a Class C2 station at 648 meters HAAT is 1.8 kilowatts.[2]

(c) There are slight discrepancies between the tower heights listed in CFMLP's application (327 meters AGL/617 meters AMSL) and those found in our records (329.5 meters AGL/624.5 meters AMSL) for its site approximately 29 kilometers Southeast of Vancouver.

While none of these discrepancies affect the tenderability or acceptability of the noted applications, each applicant will be required to submit the appropriate clarifying or corrective amendment to the presiding Administrative Law Judge.

13. *Financial.* In response to Section III, Clark certified that it did not have sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed Vancouver facilities for three months without revenue. Shabaz, in response to the same section, indicated that it did not "possess . . . the financial documentation necessary to certify that it is financially qualified to be a Commission licensee." While the applicant indicated that this documentation "will be assembled shortly and the appropriate certification made at that time," our records reveal no such amendment filed either as of right or with good cause. An issue must therefore be specified against both applicants.

14. *Cross-Interest.* Gregory Darnell Smith, President and 100% owner of Smith Broadcasting, Inc., is the national sales manager of KGON (FM) in Portland, Oregon. Lynne Keller, sole general partner of Clark, is an account executive with KKSN-FM, Portland, Oregon. In the former's case, his employment in a managerial capacity represents a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Smith has indicated his intent to terminate his employment with KGON in the event of grant of his application. In the latter case, it is not immediately apparent whether Clark's position is managerial and she will therefore be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, providing a job description and detailing Keller's position at KKSN-FM. Upon evaluation of the requested amendment, the Judge will then determine whether Clark's application represents a potential violation of the cross-interest policy.

15. *EEO.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Smith, Foster, VPBC, Cascade and Shabaz filed such statements, each is deficient. VPBC's EEO Model Program Report (Form 396-A) contains only pages 1 and 4, and therefore does not contain the majority of the information required to make the necessary determination regarding the applicant's proposed equal employment opportunity program. Cascade, as noted in paragraph 8 hereinabove, amended its organizational structure to change from a general partnership to a limited partnership. In its tendered application, Cascade stated that "president" B. Jean Andrews would be the person responsible for implementing the applicant's equal employment opportunity program. However, with its change to a limited partnership with one apparent general partner (Irmatine C. Chastang), Cascade has failed to modify its proposal to name the person or position now responsible for implementing its EEO program. Further, Smith, Foster, Cascade and Shabaz each fail to specify a women's organization it proposes to utilize for recruitment purposes. Therefore, each will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

16. *Late-filed Amendments/ 1.65 Accepted.* The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after July 31, 1989, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Q Prime	October 24, 1989; January 10 and March 20, 1990
Fort	June 1, 1990
Smith	December 4, 1989
Weagant	February 7 and March 8, 1990
KLRK	October 25, 1989
Vancouver	October 3, 1989
Turnbeaugh	August 7 and October 2, 1989
Eells	October 30, 1989; January 30, 1990
Limited	August 8, 1989
CWLP	July 6, 1990
Reunion	November 29, 1989

17. *Late-filed Amendments/Accepted for Good Cause.* The applicants below have petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE FILED
Smith	April 12, 1990
Vancouver	December 11, 1989; January 8, 1990
Turnbeaugh	August 7, 1989

18. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Sexton whether it has reasonable assurance of the availability of its transmitting antenna site.

2. If a final environmental impact statement is issued with respect to KRIZ, Fort, Atwater, Wireless, KLRK, Group and/or CRBC in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine whether there is a reasonable possibility that the tower heights and/or locations proposed by KRIZ, Atwater, Wireless, Weagant, KLRK, Broadcasters and Trans-Columbia would would constitute a hazard to air navigation.

4. To determine with respect to Clark and Shabaz whether either applicant is financially qualified.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That, after grant of any of the captioned applications, program test authority on Channel 290C2 may not commence until FM Station KFAT commences operations on Channel 292C.

22. IT IS FURTHER ORDERED, That Turnbeaugh submit an amendment containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

23. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Limited as a result of this proceeding, its grant will be without prejudice to: (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A. S. D. Answer Service, Inc. et al.*, CC Docket No. 82-587 *et seq.* ; (iii) *Utah Telecourier v MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U.S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

24. IT IS FURTHER ORDERED, That Cascade file the amendment described in paragraph 9 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, KRIZ, Fort, Atwater, Wireless, KLRK, Group and CRBC shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That Fort, Wireless, Reunion and CFMLP submit the amendments described in paragraph 12 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That, in the event of grant of Smith's application, Gregory Darnell Smith will be ordered to sever all connections with Stations KGON (FM) and KSGO (AM) prior to the commencement of program test authority.

29. IT IS FURTHER ORDERED, That Clark submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order, clarifying the nature of her current position with FM Station KKSN (Portland, Oregon).

30. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Smith, Foster, VPBC, Cascade and Shabaz shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That the petitions for leave to amend specified in paragraphs 16 and 17 above ARE GRANTED and the accompanying amendments ARE ACCEPTED to the extent indicated.

32. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

33. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

34. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Wireless noted in its amendment that it was advised by an official in the FAA's Seattle office "that no applicant for the allotment in question (105.9 MHz in Vancouver, Washington) had received FAA clearance with respect to predicted intermodulation interference." *Petition for Leave to Amend*, filed December 19, 1989, at note 1. A similar note was included in Smith's July 24, 1989 amendment. While the FAA has not, to date, issued such a blanket objection to the captioned proposals, it will be offered full opportunity to present any comments regarding this matter during the comparative phase of this proceeding.

[2] In this case, this discrepancy is neither a tenderability nor an acceptability defect insofar as the minimal nature of the defect appears to be attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 25, 1990

Released: November 19, 1990

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Cablevision VI, Inc. 4410-RK
2195 Ingersoll Avenue
Des Moines, Iowa 50312

In re: CSR-3181

Gentlemen:

This is in regard to a Petition for Special Relief, filed on your behalf on February 17, 1987. The petition seeks removal of a divestiture condition imposed upon Heritage Broadcasting Group, Inc. (Heritage) by the Mass Media Bureau on August 14, 1985, in granting an application to assign the license of television station KDLT(TV), Mitchell, South Dakota to Heritage. Heritage is a wholly owned subsidiary of Heritage Communications, Inc. Cablevision VI, Inc., another wholly owned subsidiary of Heritage Communications, Inc., owns a 1% equity interest and is the sole general partner of Cablevision Associates VI, the owner of a cable television system serving Hawarden, Iowa. The Hawarden cable system is within the predicted Grade B contour of television station KDLT(TV). Section 613(a) of the Cable Communications Policy Act of 1984, 47 U.S.C. §533(a),[1] prohibits common ownership or control of a television broadcast station and a cable television system "within the predicted Grade B contour of such station." Accordingly, based on Heritage Communications, Inc.'s common control and the proximate locations of the Hawarden cable television system and KDLT(TV), the August 14, 1985 grant required that Cablevision VI, Inc. divest itself of all interest in the Hawarden cable television system, which serves 492 subscribers, within 18 months of the consummation of the assignment.

Your petition argues: (1) that the Commission has the authority to waive §613(a) of the Act, and (2) that we should, based on the circumstances of this matter, exercise our authority and issue a permanent waiver. In order to determine whether to consider your factual arguments, we must first make a determination as to our authority to issue a permanent waiver of §613(a) of the Act.

You argue that Congress, in enacting §613(a), intended to take into account the Commission's prior administrative actions and interpretations, in that Congress stated that it intended to codify our existing rule, §76.501, 47 C.F.R. §76.501. You also point out that Congress codified the Commission's telephone/cable waiver provisions, which were expressly provided for in the rules, and argue that Congress would have codified our cable/television waiver policy, but for the fact that the waiver policy was never promulgated as a rule. This interpretation leads you to conclude that the Commission has the ability to waive §613(a). In support of this proposition, you cite *Golden West Associates, L. P.*, 59 RR 2d 125, 131 (1985), where the Commission granted a transfer of television station KTLA-TV, Los Angeles, California, subject to the condition that the transferee divest itself of its co-located cable television systems within 18 months of the consummation of the transfer. You maintain that in doing so, we relied upon the holding in *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267 (1978), which you cite for the proposition that "longstanding administrative interpretations of a *rule* subsequently enacted by Congress generally are presumed to be adopted by Congress," *Id.* at 274-275 (emphasis added). In fact, *NLRB v. Bell Aerospace, Co.* states that a court may "accord great weight to the longstanding interpretation of a *statute* by an agency charged with its administration. This is especially so where Congress has re-enacted the *statute* without pertinent change." *Id.* (emphasis added) (footnotes omitted). The Commission in *Golden West* did recognize the distinction between agency adopted rules and statutory requirements, and concluded that Congress did not preclude it from granting the transfer, conditioned on the 18-month divestiture period. In effect, the Commission did not waive §613(a), but delayed enforcement temporarily to accommodate the exigencies of the marketplace. However, having already been granted 18 months in which to come into compliance, you now request a permanent waiver. We do not agree with your contention that *NLRB* and *Golden West* can be used to support a permanent waiver of the Act's cable/broadcast television cross-ownership prohibition.

Petitioner maintains that Commission precedent prior to the Cable Act would have permitted a waiver of the Commission's cross-ownership rule, §76.501, where the cable television system was not within the actual (as opposed to the predicted) Grade B contour of the co-owned television broadcast station. *See, e.g., New Channels Corp.*, 55 FCC2d 623, 624-25 (1975). Petitioner argues that the actual Grade B contour of KDLT(TV) does not cover the Hawarden cable television system. However, the clear language of §613(a) prohibits cross-ownership between a co-located cable system and television station based on the *predicted* Grade B contour of the television broadcast station, and contains no waiver provisions. You maintain that legislative history and prior FCC policy should be used to interpret §613(a) of the Cable Act. However, absent ambiguity on the face of the statute, the Commission should act with "reluctance" to rely upon legislative history, particularly to support a result contrary to the statute's clear language. *See ACLU v. FCC*, 823 F.2d 1554, 1558 (D.C. Cir. 1987). Further, even if we were to look at the legislative history, based on your contention that Congress codified the Commission's former rule with its waiver policies intact, the legislative history is silent on this issue. Moreover, §613 of the Act contains specific authority for the Commission to waive telephone/cable cross-ownership prohibitions, while no such waiver authority is present in §613's language prohibiting cable/broadcast cross-ownership.[2] We therefore conclude that the Commission does not have the authority to issue a permanent waiver of §613(a) of the Cable Act. Accordingly, it is not necessary to address your factual arguments regarding the issuance of a permanent waiver.

We now turn to Cablevision's compliance with our August 14, 1985 grant of assignment of television station KDLT(TV), in which we required divestiture of the

Hawarden cable television system within 18 months. Cablevision has submitted in its petition, should the Commission conclude it cannot waive the statutory provision, an arrangement by which Cablevision would lease the physical assets of the cable system to an unaffiliated cable operator who would exclusively operate and manage the cable system. This proposal, according to petitioner, would obviate the attributable interest in the system. In this regard, petitioner has presented no specific documents or actual agreements. Consequently, we are unable to determine whether the proposal would conform with our attribution policies. Accordingly, Cablevision is directed, within 30 days of this letter, to advise the Chief, Mass Media Bureau, of its plan for divestiture and to submit for review the specifics of any "insulation" arrangement it may choose to effectuate. It is also directed to divest itself of the Hawarden, Iowa cable television system or effectuate an acceptable insulation arrangement within 120 days of the date of this letter. Accordingly, the Petition for Special Relief filed on behalf of Cablevision VI, Inc. is hereby DENIED. Further, IT IS ORDERED, that Cablevision VI, Inc. submit the response specified above within 30 days of the date of this letter, and divest itself of the Hawarden, Iowa cable television system (or adopt appropriate insulation measures) within 120 days of the date of this letter.

This letter was adopted by the Commission on October 25, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* also, §76.501(a)(2) of the Commission's Rules, 47 C.F.R. §76.501(a)(2).

[2] Generally, where Congress has intended to grant the Commission authority to waive provisions of the Communications Act, it has done so explicitly. *See, e.g.*, 47 U.S.C. §§310(b)(4) and 317(d). No such explicit authority is conferred in 47 U.S.C. §613(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

TCI CABLEVISION	CSR-3365
OF TEXAS, INC.	TX0087
Liberty, Texas	TX0922
Dayton, Texas	

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1990; Released: November 19, 1990

By the Commission:

1. On February 7, 1990, TCI Cablevision of Texas, Inc. (hereinafter "TCI"), operator of a cable television system serving Liberty and Dayton, Texas, filed the captioned petition for special relief. By this petition, TCI seeks a declaratory ruling concerning the applicability to TCI of the Commission's network nonduplication and syndicated exclusivity rules, §§76.92-76.161 of the Commission's Rules, or, in the alternative, a waiver of these rules. TCI's petition is unopposed.

2. TCI states that its system serves 2237 subscribers -- 1565 in Liberty and 672 in Dayton -- from a single headend. Dayton is located within the 35-mile specified zone of the Houston, Texas major television market (15), while Liberty is not. TCI carries seven of the local Houston television broadcast stations on its system,[1] as well as the network affiliates from Beaumont and Port Arthur, Texas.[2] KJAC-TV from Port Arthur and KFDM-TV from Beaumont place predicted Grade B contours over both Liberty and Dayton, while KBMT from Beaumont places a predicted Grade B contour only over Liberty. None of the Beaumont or Port Arthur stations is significantly viewed in Liberty County, in which Liberty and Dayton are located. TCI has received network program nonduplication protection requests from KPRC-TV, KHOU-TV, and KTRK-TV, and it has received syndicated exclusivity protection requests from KHOU-TV, KRIV, and KHTV. The net result of the various requests for exclusivity protection made by the Houston stations is that TCI will have to provide a different complement of blackout protection in each portion of its cable system. This results from the fact that Dayton lies within the Houston market's specified zone, while Liberty does not. [3]

3. In support of its petition, TCI notes that the Commission has exempted cable systems serving fewer than 1000 subscribers from compliance with the program exclusivity rules, citing §§76.95 and 76.156 of the Rules, in view of the financial burden that application of the rules could place on such small systems. The same intent and rationale should apply to systems in TCI's situation, argues petitioner: systems serving more than 1000 subscribers in various communities, yet serving fewer than 1000 subscribers in a community (or communities) subject to different blackout requirements as a result of the Commission's exclusivity rules should also be exempt from them. To such a system, claims TCI, the inconvenience and costs of compliance are more burdensome than for a system subject to uniform protection requirements.

4. Alternatively, argues TCI, assuming that the program exclusivity rules do apply to TCI, the Commission should waive the rules. TCI contends that it is not feasible for it to limit the protection requested by the Houston stations solely to Dayton, noting that Dayton is served by a trunk line which also serves a portion of Liberty. From the very first adoption of program protection rules in 1966, claims TCI, the Commission has demonstrated its concern that smaller cable systems not be burdened with unwarranted and excessive costs of compliance. This concern, notes TCI, underlies the 1000-subscriber exemption and should apply in the instant case. Failure to waive the rules, argues TCI, will deprive TCI's subscribers of alternative viewing choices and will unjustly enrich the stations requesting protection, extending them beyond the stations' rightful market limits. Moreover, the minimum cost of compliance, claims TCI, would exceed $134,000, for the construction of a new, separate Dayton headend -- which would then, states TCI, be exempt from compliance as serving fewer than 1000 subscribers, rendering the expenditure clearly unwarranted. Further, the facts of the present case particularly favor waiver, argues TCI, citing *Hamburg TV Cable, Inc.*, 66 FCC 2d 725 (1977), and *Cable TV Systems, Inc.*, 69 FCC 2d 1512 (1978), since the Beaumont - Port Arthur stations are local to Liberty and to Dayton, having been entitled to carriage in Liberty under the former mandatory signal carriage rules. KJAC-TV and KFDM-TV place Grade B contours over Liberty and Dayton, states TCI, while KBMT places a Grade B contour over Liberty, and many Liberty and Dayton businesses advertise on these stations, rather than on Houston stations.

5. Addressing first TCI's request for a declaratory ruling, we note that in adopting our current program exclusivity rules, we stated that "we will exempt systems serving fewer than 1,000 subscribers from compliance with these rules, just as they were exempt from our former rules." *Report and Order in Gen. Docket No. 87 - 24*, 3 FCC Rcd 5299, 5314 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC* 890 F. 2d 1173 (D.C. Cir. 1989). That this exemption is meant to apply only on a system-wide basis, and should not be expanded to a community-specific basis, is clear from its rationale: the desire to exempt cable systems from burdensome costs, on a per subscriber basis. That a particular community unit constituting a portion of a cable system may as a community unit have fewer than 1000 subscribers is irrelevant to the size of the system as a whole. It is the system, not each or any individual community unit, that is the operating financial entity that will bear costs of operation, across the entire system. Moreover, the Commission has never applied its prior 1000-subscriber exemption on anything other than a system-wide basis, *see, e.g., Bedford Improved T.V., Inc.*, 61 FCC 2d 1001 (1976).[4]

6. Turning to TCI's waiver request, we are not persuaded that such relief is warranted on the facts plead. First, TCI has not demonstrated, on a system-wide basis, a cost burden that would justify waiver of the rules. In this regard, we must note that what TCI seeks to avoid are blackouts of syndicated programming only from KBMT in Dayton, and blackouts of network programming from KFDM-TV, KBMT, and KJAC-TV in Dayton. Liberty lies

beyond the Houston market zone, and both KFDM-TV and KJAC-TV encompass Dayton with predicted Grade B contours, exempting them from syndicated exclusivity blackouts. Even prior to the recent rule amendements, the Beaumont - Port Arthur stations have been subject to network nonduplication blackouts for their simultaneously duplicating programming. TCI nowhere states what switching equipment, if any, it may already have on hand for compliance with the rules prior to the recent amendments. Nor does TCI relate the anticipated costs of additional construction -- even assuming a completely new headend is necessary[5] -- to its system's revenues, profits, and cash flow. As we have stated previously, "[t]he mere detailing of expenses without demonstrating their relationship to the cable system's total financial position fails to meet the burden required for granting a waiver of the Commission's Rules." *Welch Antenna Co.*, 49 FCC 2d 1032, 1033 (1974) (citations omitted). *See also Pocahontas Cable TV, Inc.*, 63 FCC 2d 294, 298 (1977); *Hoosier Hills Cable Co.*, 48 FCC 2d 138 (1974), *recon. granted in part*, 51 FCC 2d 1137 (1975).

7. Second, TCI fails to address the question of subscriber growth, which must be a factor in weighing the equities in cases such as these. We note that TCI's penetration rate in Dayton is less than 30%. The system's potential subscribership is over 2000 in Dayton and over 2500 in Liberty.

8. Finally, our program exclusivity rules are designed to "increase the diversity of programming options available to the public." *United Video, Inc. v. FCC*, 890 F. 2d at 1181. Any short-term loss of programming will more than be compensated for by long-term gains. The Commission determined in *Gen. Docket No. 87-24, supra*, that encouraging cable systems to provide greater diversity of programming is of greater public benefit than the carriage of duplicating programming. TCI has demonstrated no compelling circumstances which would lead us to a contrary conclusion in its particular case. In short, TCI has provided insufficient evidence to justify its request for waiver.

9. In view of the foregoing, we find that grant of TCI's petition is not in the public interest.

10. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3365), filed February 7, 1990 by TCI Cablevision of Texas, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These are the following stations: KPRC-TV (NBC, Channel 2), KUHT (PBS, Channel 8), KHOU-TV (CBS, Channel 11), KTRK-TV (ABC, Channel 13), KTXH (Ind., Channel 20), KRIV (Ind., Channel 26), and KHTV (Ind., Channel 39). TCI does not carry Television Broadcast Station KETH (ETV, Channel 14).

[2] These three stations are as follows: KFDM-TV (CBS, Channel 6), and KBMT (ABC, Channel 12), Beaumont, Texas; and KJAC-TV (NBC, Channel 4), Port Arthur, Texas.

[3] KBMT is subject to syndicated exclusivity blackouts only in Dayton. The network programming of KFDM-TV, KJAC-TV, and KBMT is subject to deletion in Dayton as well. However, the syndicated programs of KFDM-TV and of KJAC-TV are not subject to blackout protection on any portion of TCI's system, because both stations place predicted Grade B contours over Liberty and over Dayton. *See* §§76.92(b), 76.151, and 76.156(a) of the Commission's Rules.

[4] Both *Hamburg TV Cable, Inc.*, and *Cable TV Systems, Inc.*, relied upon other economic factors not present here, including our now-discarded reliance upon lack of adverse impact to local stations, and nearly 100% penetration by a system fluctuating around the 1000-subscriber level.

[5] TCI states that a simple blocking of signals in Dayton is not possible, because Dayton is served by an extension of trunk line which also serves a portion of Liberty. TCI provides no information on costs of reconfiguration to permit a Dayton block. Moreover, as noted above, TCI is not obligated to carry KFDM-TV, KBMT, and KJAC-TV to any portion of Liberty.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND TELEPHONE
AND TELEGRAPH CO.

Apparent Violations of the
Commission's Rules

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER TO SHOW CAUSE

Adopted: November 9, 1990; Released: November 9, 1990

By the Commission: Commissioner Barrett concurring and issuing a statement.

I. INTRODUCTION

1. In December 1988, New England Telephone and Telegraph Co. (NET) apparently reported erroneous data to the National Exchange Carrier Association, Inc. (NECA) as part of a concerted effort by NET and other carriers to increase the rate of return for NECA's common line (CL) pool for 1988. This concerted action led NECA to decrease these carriers' shares of the revenues from the CL pool below the levels the carriers had earned. NET and the other participants apparently accounted for their decreased shares by reducing their revenues in Account 5082, Switched access revenue, rather than by recording the reductions as nonoperating items.

2. We find the carriers' apparent conduct unacceptable, and today we issue Notices of Apparent Liability for Forfeiture against four participants.[1] These Notices inform NET and the other participants that their accounting practices appear to violate Sections 32.4999 and 32.5082 of the Commission's Rules.[2] The Notices also inform these carriers that, in view of their accounting violations, they are each apparently liable for a forfeiture of $250,000, in accordance with Section 220(d) of the Communications Act of 1934, as amended. [3] In addition, we require each of the four carriers to show cause why they should not be required to record the effects of erroneous reporting as nonoperating items, and we require NET and two other participants to show cause why they should not reflect their apparent prior understatement of interstate revenue on their next quarterly rate of return reports.[4] Finally, to enable state regulatory commissions and consumers to become fully informed regarding the carriers' conduct, a separate Order authorizes the Common Carrier Bureau to release its audit report on this matter.

II. BACKGROUND

3. NECA is a nonprofit corporation established pursuant to Commission Order[5] to develop interstate access tariffs and administer interstate access revenue pools, including the CL pool. NECA is responsible for pooling revenues derived from access charges and distributing those revenues to the LECs. On a monthly basis, NECA receives revenue, expense, and investment figures from the LECs and computes each LEC's monthly share of the pools in which it participates. Initially, the figures are only estimates, but in later months they are adjusted by the LECs to the actual monthly figures. The LECs have up to 24 months following any given month to submit adjustments correcting errors or omissions in that month's settlement data. The purpose of this adjustment procedure is to ensure that monthly settlement data are accurate and consistent with Commission rules.

4. During 1989, the Common Carrier Bureau audited the NECA settlement process, focusing on major adjustments LECs reported to the CL pool during the October, November, and December 1988 settlement cycles. The Bureau reviewed a December 1988 adjustment in which NET removed expenses for information origination/termination equipment from that pool's expenses and other taxes category.[6] Previously, NET had revised its internal procedures for separating information origination/termination equipment costs and allocating them among rate elements to reflect changes in the Commission's rules. NET had reported data to NECA that reflected the revised procedures, and NECA had calculated each participating LEC's share of the CL pool in accordance with these data. NET recorded revenue reflecting its share of that pool in Account 5082.

5. In December 1988, however, NET reported adjusted data to NECA which were inconsistent with the prior data and which nullified NET's attempt to comply with the jurisdictional separations and access charge rules. The new data removed substantial information origination/termination equipment expenses from the CL pool. This, in turn, decreased NET's monthly share of the revenue from the CL pool below the level NET had earned. NET apparently accounted for this decrease by reducing switched access revenue in Account 5082.

III. DISCUSSION

6. We find NET apparently liable for a forfeiture under Section 220(d) of the Communications Act for failure to keep its regulated books of account in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules. Section 32.4999 requires carriers to credit the appropriate revenue accounts when "revenue is actually earned"[7] and permits deductions from revenue only in certain defined circumstances.[8] NET was correct when it brought its internal procedures for information origination/termination equipment expenses into conformity with our rules and when it reported data to NECA reflecting the revised procedures. NET was also correct in recording CL revenue reflecting those procedures in Account 5082, since that revenue constituted the revenue NET had actually earned for its switched access operations.

7. NET, however, violated our rules in December 1988 when it reported adjusted data to NECA that were inconsistent with the revised procedures and when it reduced revenues recorded in Account 5082 to reflect that adjusted data. When it reported erroneous data to NECA, NET reduced its share of the CL pool for that month. That December 1988 adjustment also effectively reduced NET's revenues for January through November 1988, since NET calculated the amount of the December adjust-

ment on the basis of data for all of 1988. When it recorded the impact of that adjustment in Account 5082, NET was deducting revenues from that account.

8. Our rules, however, permit deductions from revenue only for "[c]orrections of overcharges, authorized refunds of overcollections previously credited to revenue, authorized refunds and adjustments on account of failure in service, and other corrections."[9] None of these circumstances applies here. The December adjustment did not correct for prior overcharges or other errors, was not an authorized refund of a prior overcollection, and was not in response to a failure in service. As a consequence, NET made an improper and unauthorized deduction from revenues when it recorded the effects of the December adjustment in Account 5082. Accordingly, NET apparently violated Sections 32.4099 and 32.5082 of our Rules in accounting for its transactions with NECA, and those violations continue to the present. The effects of using the erroneous allocator should have been recorded as nonoperating items in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

9. We are particularly concerned that NET apparently reported erroneous data to NECA with full knowledge that it was erroneous.[10] NET appears to have done this as part of a concerted effort, in conjunction with several other Subset I carriers,[11] to increase the CL pool's rate of return for 1988. Our investigation disclosed that certain officials of these Subset I companies, some serving on the NECA board of directors, became concerned when the NECA data for October 1988 showed an unexpected drop in that rate of return. These officials apparently concluded that the decreased earnings were caused primarily by large October 1988 adjustments that increased the amounts reported for the expenses and other taxes category of the CL pool. To offset these large adjustments, NET, along with several other Subset I carriers, apparently reported certain adjustments in December solely for the purpose of decreasing the costs in the expenses and other taxes category and, thereby, increasing the CL pool's rate of return for 1988.

10. We believe that NET's conduct reflects a serious disregard for the integrity of the NECA reporting process and for our accounting rules. It is unacceptable for carriers to manipulate earnings by submitting erroneous data, or by otherwise undermining the reporting process prescribed by the Commission's rules. In this case, even though the increase in reported earnings benefited other carriers by giving them larger shares of the CL pool, NET's conduct has raised doubts about the integrity of the CL settlement process and, in effect, represents an encroachment upon the Commission's authority. These are serious matters. Since NET's failure to follow the prescribed method of accounting constitutes an apparent violation of Sections 32.4999 and 32.5082 of our rules, we believe that a forfeiture is appropriate under Section 220 of the Act for failure to keep accounts in the manner prescribed by the Commission. Under the circumstances, we find NET apparently liable for a forfeiture of $250,000. This forfeiture is being assessed for a continuing violation that began on or about January 31, 1989, and that continues to this day.

11. The knowing reporting of erroneous data is not part of any carrier's telecommunications operations, and NET should not have recorded the effects of that reporting in a telecommunications revenue account. We tentatively conclude that NET should have recorded those effects in Account 7360, Other nonoperating income, which encompasses all "items of income and gains or losses from activities not specifically provided for elsewhere" in our accounting rules.[12] We order NET to show cause why such action should not be required.

12. Section 65.600 of the Commission's Rules[13] requires certain carriers, including NET, to file Commission quarterly rate of return reports stating the carriers' total interstate revenues for the preceding calendar quarter. NET's rate of return reports for 1988 apparently reflected its incorrect accounting practices and, therefore, understated its revenue for that year. We tentatively conclude that NET should compensate for this apparent understatement by including the unreported revenue in its next quarterly rate of return report, and we also order NET to show cause why such action should not be required.[14]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that New England Telephone and Telegraph Co. IS APPARENTLY LIABLE FOR FORFEITURE in the amount of $250,000 for failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules, 47 C.F.R. §§32.4999, 32.5082.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause, New England Telephone and Telegraph Co. shall pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. §1.80(h), or file a response showing why a forfeiture should not be imposed or should be reduced.[15]

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that New England Telephone and Telegraph Co. SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to record the effects of its erroneous reporting in Account 7360.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that New England Telephone and Telegraph Co. SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to adjust its next quarterly rate of return report to include the understated revenue described above.

17. IT IS FURTHER ORDERED, that the Secretary shall send by certified mail a copy of this Notice of Apparent Liability for Forfeiture and Order to Show Cause to New England Telephone and Telegraph Co., 185 Franklin Street, Boston, Massachusetts 02107.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The other carriers are New York Telephone Co. (NYT), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).

[2] 47 C.F.R. §§32.4999, 32.5082.

[3] 47 U.S.C. §220(d). Although we could assess larger forfeitures, after full consideration of the circumstances surrounding the violations, we exercise our discretion under Section 504(b) of the Act, 47 U.S.C. §504(b), to mitigate any additional amounts.

[4] We require the fourth carrier, Pacific, which made further adjustments during 1989, to show cause why it should not be required to withdraw those further adjustments.

[5] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834, *second further recon.*, 99 FCC 2d 708, *affirmed in principal part sub nom.*, National Association of Regulatory Utility Commissioners v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[6] Information origination/termination equipment is equipment used to input into or receive output from the telecommunications network. 47 C.F.R. Part 36, Appendix.

[7] 47 C.F.R. §32.4999(d).

[8] *See* 47 C.F.R. §32.4999(b).

[9] 47 C.F.R. §32.4999(b).

[10] During the Bureau's audit, the NET staff indicated that NET's internal procedures generated data on origination/termination equipment costs that were consistent with our rules and that differed from the adjusted data reported to NECA.

[11] Subset I companies consist of the Bell System Operating Companies. 47 C.F.R. §69.602.

[12] 47 C.F.R. §32.7360(a). No other account provides specific instructions on where such effects should be recorded, since the Commission did not contemplate that carriers would proceed by knowingly reporting erroneous data to NECA when they wish to forego revenues that they have a right to retain.

[13] 47 C.F.R. §65.600.

[14] In accordance with Section 220(c) of the Communications Act, 47 U.S.C. §220(c), NET will bear the burden of proving that its accounting entries in connection with its transactions with NECA comply with the Commission's accounting rules. New York Telephone Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 866, 871 (1990).

[15] Such forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington D.C. 20554.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: NECA Audit Report, Related Notices of Apparent Liability and Letter of Reprimand, and Requests for Confidential Treatment of Certain Financial Information

Today, the Commission adopted Notices of Apparent Liability regarding actions four carriers took at the direction of the National Exchange Carrier Association (NECA). In addition, we are issuing a letter to the NECA Board of Directors that indicates our intention to consider adopting rule changes that will substantially restructure NECA's processes. At the same time, we state our intention to release the audit report regarding NECA's activities.

I will concur in the decision to assess $250,000 fines on each of these carriers because I believe the violations in this case justify, in fact demand, the assessment of the maximum fine. What these carriers did in this case may seem to be rather "harmless" on its face because they appear to have "given money away." Once one scratches beneath the surface of this case, however, it is clear that the NECA Board of Directors intended to manipulate the FCC's processes to achieve unstated and potentially unlawful ends.

NECA may have made the small carriers "whole" by telling its larger member companies to "cook the books" so that the small companies would earn no less than the then authorized rate of return on common line access service. The problem with this action by the NECA Board is that it blatantly subverted the Commission's processes and policies. Indeed, NECA acted in clear defiance of both the codified rules and the apparent direction of Commission staff.

It is this sort of underhanded action that in my mind constitutes the greatest violation of the Commission's rules. Even if we could not find that any specific sum of money (whether substantial or minimal) were unlawfully charged to ratepayers as a result of this action by NECA, its decision to violate the FCC's rules and its possible intention to deceive Commission staff to achieve political or other goals cannot go unpunished. For these reasons, I would prefer to assess the maximum fine on each of these carriers, but I will concur in the Commission's action in this case. I hope that this level of forfeiture will discourage further wrongdoing by carriers under the Commission's jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE CO.

Apparent Violations of the
Commission's Rules

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER TO SHOW CAUSE

Adopted: November 9, 1990; Released: November 9, 1990

By the Commission: Commission Barrett concurring and issuing a statement.

I. INTRODUCTION

1. In December 1988, New York Telephone Co. (NYT) apparently reported erroneous data to the National Exchange Carrier Association, Inc. (NECA) as part of a concerted effort by NYT and other carriers to increase the rate of return for NECA's common line (CL) pool for 1988. This concerted action led NECA to decrease these carriers' shares of the revenues from the CL pool below the levels the carriers had earned. NYT and the other participants apparently accounted for their decreased shares by reducing their revenues in Account 5082, Switched access revenue, rather than by recording the reductions as nonoperating items.

2. We find the carriers' apparent conduct unacceptable, and today we issue Notices of Apparent Liability for Forfeiture against four participants.[1] These Notices inform NYT and the other participants that their accounting practices appear to violate Sections 32.4999 and 32.5082 of the Commission's Rules.[2] The Notices also inform these carriers that, in view of their accounting violations, they are each apparently liable for a forfeiture of $250,000, in accordance with Section 220(d) of the Communications Act of 1934, as amended. [3] In addition, we require each of the four carriers to show cause why they should not be required to record the effects of erroneous reporting as nonoperating items, and we require NYT and two other participants to show cause why they should not reflect their apparent prior understatement of interstate revenue on their next quarterly rate of return reports.[4] Finally, to enable state regulatory commissions and consumers to become fully informed regarding the carriers' conduct, a separate Order authorizes the Common Carrier Bureau to release its audit report on this matter.

II. BACKGROUND

3. NECA is a nonprofit corporation established pursuant to Commission Order[5] to develop interstate access tariffs and administer interstate access revenue pools, including the CL pool. NECA is responsible for pooling revenues derived from access charges and distributing those revenues to the LECs. On a monthly basis, NECA receives revenue, expense, and investment figures from the LECs and computes each LEC's monthly share of the pools in which it participates. Initially, the figures are only estimates, but in later months they are adjusted by the LECs to the actual monthly figures. The LECs have up to 24 months following any given month to submit adjustments correcting errors or omissions in that month's settlement data. The purpose of this adjustment procedure is to ensure that monthly settlement data are accurate and consistent with Commission rules.

4. During 1989, the Common Carrier Bureau audited the NECA settlement process, focusing on major adjustments LECs reported to the CL pool during the October, November, and December 1988 settlement cycles. The Bureau reviewed a December 1988 adjustment in which NYT removed expenses for general support facilities from that pool's expenses and other taxes category.[6] This adjustment resulted from a change in the allocator NYT used to apportion the costs of general support facilities among the interexchange category, the billing and collection category, and certain access elements. Previously, NYT had excluded equal access investment from that allocator and reported data to NECA that reflected this exclusion, and NECA had calculated each participating LEC's share of the CL pool in accordance with these data. NYT recorded revenue reflecting its share of that pool in Account 5082.

5. In December 1988, however, NYT changed its general support facilities allocator to include equal access investment. This change shifted general support facilities costs from the CL element to the local switching element and nullified NYT's earlier attempt to comply with the Commission's rules.[8] In accordance with this shift, NYT reported adjusted data to NECA that removed substantial general support facilities expenses from the CL pool retroactive to January 1, 1988. This, in turn, decreased NYT's monthly shares of the revenue from the CL pool below the levels NYT had earned. NYT apparently accounted for this decrease by reducing switched access revenue in Account 5082.

III. DISCUSSION

6. We find NYT apparently liable for a forfeiture under Section 220(d) of the Communications Act for failure to keep its regulated books of account in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules. Section 32.4999 requires carriers to credit the appropriate revenue accounts when "revenue is actually earned"[9] and permits deductions from revenue only in certain defined circumstances. NYT was correct when it initially developed a general support facilities allocator that excluded equal access investment and when it reported data to NECA reflecting that exclusion. NYT was also correct in recording CL revenue reflecting that exclusion in Account 5082, since that revenue constituted the revenue NYT had actually earned for its switched access operations.

7. NYT, however, violated our rules when it modified its general support facilities allocator to include equal access investment, when it reported adjusted data to NECA based on this erroneous allocator, and when it reduced revenues recorded in Account 5082 to reflect that adjusted data. When during December 1988 it reported adjusted data to NECA based on that allocator, NYT reduced its share of the CL pool for that month. That December 1988 adjustment also effectively reduced NYT's

revenues for January through November 1988, since NYT calculated the amount of the December adjustment on the basis of data for all of 1988. When it recorded the impact of that adjustment in Account 5082, NYT was deducting revenues from that account.

8. Our rules, however, permit deductions from revenue only for "[c]orrections of overcharges, authorized refunds of overcollections previously credited to revenue, authorized refunds and adjustments on account of failure in service, and other corrections."[10] None of these circumstances applies here. The December adjustment did not correct for prior overcharges or other errors, was not an authorized refund of a prior overcollection, and was not in response to a failure in service. As a consequence, NYT made an improper and unauthorized deduction from revenues when it recorded the effects of the December adjustment in Account 5082. Accordingly, NYT apparently violated Sections 32.4099 and 32.5082 of our Rules in accounting for its transactions with NECA, and those violations continue to the present. The effects of using the erroneous allocator should have been recorded as nonoperating items in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

9. We are particularly concerned that NYT apparently knew that its general support facilities allocator should not include equal access investment, but nevertheless modified that allocator to include such investment. NYT appears to have used an allocator it knew to be erroneous as part of a concerted effort, in conjunction with three other Subset I carriers,[11] to increase the CL pool's rate of return for 1988. Our investigation disclosed that certain officials of these Subset I companies, some serving on the NECA board of directors, became concerned when the NECA data for October 1988 showed an unexpected drop in that rate of return. These officials apparently concluded that the decreased earnings were caused primarily by large October 1988 adjustments that increased the amounts reported for the expenses and other taxes category of the CL pool. To offset these large adjustments, NYT, along with these other Subset I carriers, apparently reported certain adjustments in December solely for the purpose of decreasing the costs in the expenses and other taxes category and, thereby, increasing the CL pool's rate of return for 1988.

10. We believe that NYT's conduct reflects a serious disregard for the integrity of the NECA reporting process and for our accounting rules. It is unacceptable for carriers to manipulate earnings by submitting erroneous data, or by otherwise undermining the reporting process prescribed by the Commission's rules. In this case, even though the increase in reported earnings benefited other carriers by giving them larger shares of the CL pool, NYT's conduct has raised doubts about the integrity of the CL settlement process and, in effect, represents an encroachment upon the Commission's authority. These are serious matters. Since NYT's failure to follow the prescribed method of accounting constitutes an apparent violation of Sections 32.4999 and 32.5082 of our Rules, we believe that a forfeiture is appropriate under Section 220 of the Act for failure to keep accounts in the manner prescribed by the Commission. Under the circumstances, we find NYT apparently liable for a forfeiture of $250,000. This forfeiture is being assessed for a continuing violation that began on or about January 31, 1989, and that continues to this day.

11. The knowing reporting of erroneous data is not part of any carrier's telecommunications operations, and NYT should not have recorded the effects of that reporting in a telecommunications revenue account. We tentatively conclude that NYT should have recorded those effects in Account 7360, Other nonoperating income, which encompasses all "items of income and gains or losses from activities not specifically provided for elsewhere" in our accounting rules.[12] We order NYT to show cause why such action should not be required.

12. Section 65.600 of the Commission's Rules[13] requires certain carriers, including NYT, to file Commission quarterly rate of return reports stating the carriers' total interstate revenues for the preceding calendar quarter. NYT's rate of return reports for 1988 apparently reflected its incorrect accounting practices and, therefore, understated its revenue for that year. We tentatively conclude that NYT should compensate for this apparent understatement by including the unreported revenue in its next quarterly rate of return report, and we order NYT to show cause why such action should not be required.[14]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that New York Telephone Co. IS APPARENTLY LIABLE FOR FORFEITURE in the amount of $250,000 for failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules, 47 C.F.R. §§32.4999, 32.5082.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause, New York Telephone Co. shall pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. §1.80(h), or file a response showing why a forfeiture should not be imposed or should be reduced.[15]

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that New York Telephone Co. SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to record the effects of its erroneous reporting in Account 7360.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that New York Telephone Co. SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to adjust its next quarterly rate of return report to include the understated revenue described above.

17. IT IS FURTHER ORDERED, that the Secretary shall send by certified mail a copy of this Notice of Apparent Liability for Forfeiture and Order to Show Cause to New York Telephone Co., 1095 Avenue of the Americas, New York, New York, 10036.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The other carriers are New England Telephone and Telegraph Co. (NET), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).

[2] 47 C.F.R. §§32.4999, 32.5082.

[3] 47 U.S.C. §220(d). Although we could assess larger forfeitures, after full consideration of the circumstances surrounding the violations, we exercise our discretion under Section 504(b) of the Act, 47 U.S.C. §504(b), to mitigate any additional amounts.

[4] We require the fourth carrier, Pacific, which made further adjustments during 1989, to show cause why it should not be required to withdraw those further adjustments.

[5] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834, *second further recon.*, 99 FCC 2d 708, *affirmed in principal part sub nom.*, National Association of Regulatory Utility Commissioners v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[6] General support facilities consist of assets, such as land, buildings, and general purpose plant, whose costs are recorded in Accounts 2111 through 2124 and Accounts 6111 through 6124.

[7] Sections §69.307 and 69.401(a)(2) of the Commission's rules, 47 C.F.R. §§69.307, 69.401(a)(2), require that these costs be apportioned on the basis of apportionment results for central office equipment, information origination/termination equipment, and certain cable and wire facilities.

[8] *See* 47 C.F.R. §69.308.

[9] 47 C.F.R. §32.4999(d).

[10] 47 C.F.R. §32.4999(b).

[11] Subset I companies consist of the Bell System Operating Companies. 47 C.F.R. §69.602.

[12] 47 C.F.R. §32.7360(a). No other account provides specific instructions on where such effects should be recorded, since the Commission did not contemplate that carriers would proceed by knowingly reporting erroneous data to NECA when they wish to forego revenues that they have a right to retain.

[13] 47 C.F.R. §65.600.

[14] In accordance with Section 220(c) of the Communications Act, 47 U.S.C. §220(c), NYT will bear the burden of proving that its accounting entries for its transactions with NECA comply with the Commission's accounting rules. New York Telephone Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 866, 871 (1990).

[15] Such forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington D.C. 20554.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: NECA Audit Report, Related Notices of Apparent Liability and Letter of Reprimand, and Requests for Confidential Treatment of Certain Financial Information

Today, the Commission adopted Notices of Apparent Liability regarding actions four carriers took at the direction of the National Exchange Carrier Association (NECA). In addition, we are issuing a letter to the NECA Board of Directors that indicates our intention to consider adopting rule changes that will substantially restructure NECA's processes. At the same time, we state our intention to release the audit report regarding NECA's activities.

I will concur in the decision to assess $250,000 fines on each of these carriers because I believe the violations in this case justify, in fact demand, the assessment of the maximum fine. What these carriers did in this case may seem to be rather "harmless" on its face because they appear to have "given money away." Once one scratches beneath the surface of this case, however, it is clear that the NECA Board of Directors intended to manipulate the FCC's processes to achieve unstated and potentially unlawful ends.

NECA may have made the small carriers "whole" by telling its larger member companies to "cook the books" so that the small companies would earn no less than the then authorized rate of return on common line access service. The problem with this action by the NECA Board is that it blatantly subverted the Commission's processes and policies. Indeed, NECA acted in clear defiance of both the codified rules and the apparent direction of Commission staff.

It is this sort of underhanded action that in my mind constitutes the greatest violation of the Commission's rules. Even if we could not find that any specific sum of money (whether substantial or minimal) were unlawfully charged to ratepayers as a result of this action by NECA, its decision to violate the FCC's rules and its possible intention to deceive Commission staff to achieve political or other goals cannot go unpunished. For these reasons, I would prefer to assess the maximum fine on each of these carriers, but I will concur in the Commission's action in this case. I hope that this level of forfeiture will discourage further wrongdoing by carriers under the Commission's jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL

Apparent Violations of the
Commission's Rules

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER TO SHOW CAUSE

Adopted: November 9, 1990; Released: November 9, 1990

By the Commission: Commission Barrett concurring and issuing a statement.

I. INTRODUCTION

1. In December 1988, Pacific Bell (Pacific) apparently reported erroneous data to the National Exchange Carrier Association, Inc. (NECA) as part of a concerted effort by Pacific and other carriers to increase the rate of return for NECA's common line (CL) pool for 1988. This concerted action led NECA to decrease these carriers' shares of the revenues from the CL pool below the levels the carriers had earned. Pacific and the other participants apparently accounted for their decreased shares by reducing their revenues in Account 5082, Switched access revenue, rather than by recording the reductions as nonoperating items.

2. We find the carriers' apparent conduct unacceptable, and today we issue Notices of Apparent Liability for Forfeiture against four participants.[1] These Notices inform Pacific and the other participants that their accounting practices appear to violate Sections 32.4999 and 32.5082 of the Commission's Rules.[2] The Notices also inform these carriers that, in view of their accounting violations, they are each apparently liable for a forfeiture of $250,000, in accordance with Section 220(d) of the Communications Act of 1934, as amended. [3] In addition, we require each of the four carriers to show cause why they should not be required to record the effects of erroneous reporting as nonoperating items, and we require Pacific to show cause why it should not be required to withdraw certain 1989 adjustments to the CL pool.[4] Finally, to enable state regulatory commissions and consumers to become fully informed regarding the carriers' conduct, a separate Order authorizes the Common Carrier Bureau to release its audit report on this matter.

II. BACKGROUND

3. NECA is a nonprofit corporation established pursuant to Commission Order[5] to develop interstate access tariffs and administer interstate access revenue pools, including the CL pool. NECA is responsible for pooling revenues derived from access charges and distributing those revenues to the LECs. On a monthly basis, NECA receives revenue, expense, and investment figures from the LECs and computes each LEC's monthly share of the pools in which it participates. Initially, the figures are only estimates, but in later months they are adjusted by the LECs to the actual monthly figures. The LECs have up to 24 months following any given month to submit adjustments correcting errors or omissions in that month's settlement data. The purpose of this adjustment procedure is to ensure that monthly settlement data are accurate and consistent with Commission rules.

4. During 1989, the Common Carrier Bureau audited the NECA settlement process, focusing on major adjustments LECs reported to the CL pool during the October, November, and December 1988 settlement cycles. The Bureau reviewed an adjustment in which Pacific removed expenses for information origination/termination equipment from that pool's expenses and other taxes category.[6] Previously, Pacific had revised its internal procedures for separating information origination/termination equipment costs and allocating them among rate elements to reflect changes in the Commission's rules. Pacific had reported data to NECA that reflected the revised procedures, and NECA had calculated each participating LEC's share of the CL pool in accordance with these data. Pacific recorded revenue reflecting its share of that pool in Account 5082.

5. In December 1988, Pacific recalculated the CL portion of its information origination/termination costs using the defective procedures that it had previously abandoned. In accordance with these calculations, Pacific reported adjusted data to NECA which removed substantial general support facilities expenses from the CL pool and which nullified Pacific's earlier attempt to comply with the Commission's rules. This adjustment was spread equally among the twelve months of 1988 and decreased Pacific's monthly shares of the revenue from the CL pool below the levels Pacific had earned. Pacific apparently accounted for the decreases by reducing switched access revenue in Account 5082.

6. Pacific's use of the defective procedures shifted a portion of Pacific's information origination/termination costs from the CL element to the special access element. When it reported adjusted data to NECA in December 1988, Pacific apparently anticipated that the Commission would approve this increase in special access costs. By early January 1989, Pacific apparently concluded that the Commission was not going to approve such an increase and that the December 1988 adjustment should be reversed. Pacific reversed a portion of that adjustment in the January 1989 settlement cycle, and the remainder in the February 1989 and April 1989 settlement cycles.

III. DISCUSSION

7. We find Pacific apparently liable for a forfeiture under Section 220(d) of the Communications Act for failure to keep its regulated books of account in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules. Section 32.4999 requires carriers to credit the appropriate revenue accounts when "revenue is actually earned"[7] and permits deductions from revenue only in certain defined circumstances.[8] Pacific was correct when it when it brought its internal procedures for information origination/termination equipment expenses into conformity with our rules and when it reported data to NECA reflecting the revised procedures. Pacific was also correct in recording CL revenue reflecting those pro-

cedures in Account 5082, since that revenue constituted the revenue Pacific had actually earned for its switched access operations.

8. Pacific, however, violated our rules in December 1988 when it reported adjusted data to NECA that were inconsistent with the revised procedures and when it recorded revenues in Account 5082 reflecting that adjusted data. When it reported erroneous data to NECA, Pacific reduced its share of the CL pool for that month. That December 1988 adjustment also effectively reduced Pacific's revenues for January through November 1988, since Pacific calculated the amount of the December adjustment on the basis of data for all of 1988. When it recorded the impact of that adjustment in Account 5082, Pacific was deducting revenues from that account.

9. Our rules, however, permit deductions from revenue only for "[c]orrections of overcharges, authorized refunds of overcollections previously credited to revenue, authorized refunds and adjustments on account of failure in service, and other corrections."[9] None of these circumstances applies here. The December adjustment did not correct for prior overcharges or other errors, was not an authorized refund of a prior overcollection, and was not in response to a failure in service. As a consequence, Pacific made an improper and unauthorized deduction from revenues when it recorded the effects of the December adjustment in Account 5082. Accordingly, Pacific apparently violated Sections 32.4099 and 32.5082 of our Rules in accounting for its December adjustment, and those violations continue to the present. The effects of using the erroneous allocator should have been recorded as nonoperating items in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

10. We are particularly concerned that Pacific apparently reported erroneous data to NECA with full knowledge that it was erroneous and that Pacific did not provide entirely accurate data until April 1989 even though it apparently had determined during January 1989 that the December 1988 adjustment should be reversed. Pacific appears to have used an allocator it knew to be defective as part of a concerted effort, in conjunction with three other Subset I carriers,[10] to increase the CL pool's rate of return for 1988. Our investigation disclosed that certain officials of these Subset I companies, some serving on the NECA board of directors, became concerned when the NECA data for October 1988 showed an unexpected drop in that rate of return. These officials apparently concluded that the decreased earnings were caused primarily by large October 1988 adjustments that increased the amounts reported for the expenses and other taxes category of the CL pool. To offset these large adjustments, Pacific, along with these other Subset I carriers, apparently reported certain adjustments in December solely for the purpose of decreasing the costs in the expenses and other taxes category and, thereby, increasing the CL pool's rate of return for 1988.

11. We believe that Pacific's conduct reflects a serious disregard for the integrity of the NECA reporting process and for our accounting rules. It is unacceptable for carriers to manipulate earnings by submitting erroneous data, or by otherwise undermining the reporting process prescribed by the Commission's rules. It is also unacceptable for a carrier to wait several months to correct known errors in data that it provides to NECA. Pacific's conduct has raised doubts about the integrity of the CL settlement process and, in effect, represents an encroachment upon the Commission's authority. These are serious matters. Since Pacific's failure to follow the prescribed method of accounting constitutes an apparent violation of Sections 32.4999 and 32.5082 of our Rules, we believe that a forfeiture is appropriate under Section 220 of the Act for failure to keep accounts in the manner prescribed by the Commission. Under the circumstances, we find Pacific apparently liable for a forfeiture of $250,000. This forfeiture is being assessed for a continuing violation that began on or about January 31, 1989, and that continues to this day.

12. The knowing reporting of erroneous data is not part of any carrier's telecommunications operations, and Pacific should not have recorded the effects of that reporting in a telecommunications revenue account. We tentatively conclude that Pacific should have recorded those effects in Account 7360, Other nonoperating income, which encompasses all "items of income and gains or losses from activities not specifically provided for elsewhere" in our accounting rules.[11] We order Pacific to show cause why such action should not be required.

13. When it made its December 1988 adjustment, Pacific was voluntarily foregoing revenues that it had a right to retain. Despite this voluntary forbearance, Pacific filed adjustments in January, February, and April 1989 that, in effect, withdrew the December 1988 adjustment. We tentatively conclude that these 1989 adjustments were neither equitable nor consistent with our accounting and access charge rules. To prevent Pacific from profiting in any way from its manipulation of the NECA adjustment process, we order Pacific to show cause why it should not be required to withdraw these 1989 adjustments.[12]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Pacific Bell IS APPARENTLY LIABLE FOR FORFEITURE in the amount of $250,000 for failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules, 47 C.F.R. §§32.4999, 32.5082.

15. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Pacific Bell shall pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. §1.80(h), or file a response showing why a forfeiture should not be imposed or should be reduced.[13]

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that Pacific Bell SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to record the effects of its erroneous reporting in Account 7360.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that Pacific Bell SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to withdraw its January 1989, February 1989, and April 1989 adjustments to the Common Line pool regarding information origination/termination equipment expenses.

18. IT IS FURTHER ORDERED, that the Secretary shall send by certified mail a copy of this Notice of Apparent Liability for Forfeiture to Pacific Bell, 140 New Montgomery Street, San Francisco, California 94105.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The other carriers are New England Telephone and Telegraph Co., New York Telephone Co., and Southwestern Bell Telephone Company.

[2] 47 C.F.R. §§32.4999, 32.5082.

[3] 47 U.S.C. §220(d). Although we could assess larger forfeitures, after full consideration of the circumstances surrounding the violations, we exercise our discretion under Section 504(b) of the Act, 47 U.S.C. §504(b), to mitigate any additional amounts.

[4] We require the other three carriers to show cause why they should not be required to reflect their apparent prior understatement of interstate revenue on their next quarterly rate of return reports.

[5] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834, *second further recon.*, 99 FCC 2d 708, *affirmed in principal part sub nom.*, National Association of Regulatory Utility Commissioners v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[6] Information origination/termination equipment is equipment used to input into or receive output from the telecommunications network. 47 C.F.R. Part 36, Appendix.

[7] 47 C.F.R. §32.4999(d).

[8] *See* 47 C.F.R. §32.4999(b).

[9] 47 C.F.R. §32.4999(b).

[10] Subset I companies consist of the Bell System Operating Companies. 47 C.F.R. §69.602.

[11] 47 C.F.R. §32.7360(a). No other account provides specific instructions on where such effects should be recorded, since the Commission did not contemplate that carriers would proceed by knowingly reporting erroneous data to NECA when they wish to forego revenues that they have a right to retain.

[12] In accordance with Section 220(c) of the Communications Act, 47 U.S.C. §220(c), Pacific will bear the burden of proving that its accounting entries for its transactions with NECA comply with the Commission's accounting rules. New York Telephone Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 866, 871 (1990).

[13] Such forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington D.C. 20554.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: NECA Audit Report, Related Notices of Apparent Liability and Letter of Reprimand, and Requests for Confidential Treatment of Certain Financial Information

Today, the Commission adopted Notices of Apparent Liability regarding actions four carriers took at the direction of the National Exchange Carrier Association (NECA). In addition, we are issuing a letter to the NECA Board of Directors that indicates our intention to consider adopting rule changes that will substantially restructure NECA's processes. At the same time, we state our intention to release the audit report regarding NECA's activities.

I will concur in the decision to assess $250,000 fines on each of these carriers because I believe the violations in this case justify, in fact demand, the assessment of the maximum fine. What these carriers did in this case may seem to be rather "harmless" on its face because they appear to have "given money away." Once one scratches beneath the surface of this case, however, it is clear that the NECA Board of Directors intended to manipulate the FCC's processes to achieve unstated and potentially unlawful ends.

NECA may have made the small carriers "whole" by telling its larger member companies to "cook the books" so that the small companies would earn no less than the then authorized rate of return on common line access service. The problem with this action by the NECA Board is that it blatantly subverted the Commission's processes and policies. Indeed, NECA acted in clear defiance of both the codified rules and the apparent direction of Commission staff.

It is this sort of underhanded action that in my mind constitutes the greatest violation of the Commission's rules. Even if we could not find that any specific sum of money (whether substantial or minimal) were unlawfully charged to ratepayers as a result of this action by NECA, its decision to violate the FCC's rules and its possible intention to deceive Commission staff to achieve political or other goals cannot go unpunished. For these reasons, I would prefer to assess the maximum fine on each of these carriers, but I will concur in the Commission's action in this case. I hope that this level of forfeiture will discourage further wrongdoing by carriers under the Commission's jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN
BELL TELEPHONE
COMPANY

Apparent Violations of the
Commission's Rules

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER TO SHOW CAUSE

Adopted: November 9, 1990; Released: November 9, 1990

By the Commission: Commission Barrett concurring and issuing a statement.

I. INTRODUCTION

1. In December 1988, Southwestern Bell Telephone Company (Southwestern) apparently reported erroneous data to the National Exchange Carrier Association, Inc. (NECA) as part of a concerted effort by Southwestern and other carriers to increase the rate of return for NECA's common line (CL) pool for 1988. This concerted action led NECA to decrease these carriers' shares of the revenues from the CL pool below the levels the carriers had earned. Southwestern and the other participants apparently accounted for their decreased shares by reducing their revenues in Account 5082, Switched access revenue, rather than by recording the reductions as nonoperating items.

2. We find the carriers' apparent conduct unacceptable, and today we issue Notices of Apparent Liability for Forfeiture against four participants.[1] These Notices inform Southwestern and the other participants that their accounting practices appear to violate Sections 32.4999 and 32.5082 of the Commission's Rules.[2] The Notices also inform these carriers that, in view of their accounting violations, they are each apparently liable for a forfeiture of $250,000 in accordance with Section 220(d) of the Communications Act of 1934, as amended. [3] In addition, we require each of the four carriers to show cause why they should not be required to record the effects of erroneous reporting as nonoperating items, and we require Southwestern and two other participants to show cause why they should not reflect their apparent prior understatement of interstate revenue on their next quarterly rate of return reports.[4] Finally, to enable state regulatory commissions and consumers to become fully informed regarding the carriers' conduct, a separate Order authorizes the Common Carrier Bureau to release its audit report on this matter.

II. BACKGROUND

3. NECA is a nonprofit corporation established pursuant to Commission Order[5] to develop interstate access tariffs and administer interstate access revenue pools, including the CL pool. NECA is responsible for pooling revenues derived from access charges and distributing those revenues to the LECs. On a monthly basis, NECA receives revenue, expense, and investment figures from the LECs and computes each LEC's monthly share of the pools in which it participates. Initially, the figures are only estimates, but in later months they are adjusted by the LECs to the actual monthly figures. The LECs have up to 24 months following any given month to submit adjustments correcting errors or omissions in that month's settlement data. The purpose of this adjustment procedure is to ensure that monthly settlement data are accurate and consistent with Commission rules.

4. During 1989, the Common Carrier Bureau audited the NECA settlement process, focusing on major adjustments LECs reported to the CL pool during the October, November, and December 1988 settlement cycles. The Bureau reviewed two adjustments in the general support facilities expenses Southwestern reported for that pool's expenses and other taxes category.[6] The first or October 1988 adjustment increased the general support facilities expenses Southwestern reported to NECA. The second or December 1988 adjustment decreased those expenses. Both adjustments were retroactive to January 1, 1988.

5. The adjustments resulted from changes in the basic study Southwestern used to separate circuit equipment costs between the interstate and intrastate jurisdictions. Between January 1 and October 1, 1988, Southwestern used a circuit equipment study that it had performed during 1987. This study was based on December 1986 data. During 1988, however, Southwestern developed a mechanized process to supplant that basic study. By early September 1988, trial runs of the new process apparently revealed that the original study did not reflect Southwestern's current operations, and Southwestern revised its study based on 1988 data the new process had generated. The October 1988 adjustment reported data to NECA that reflected this revised study, and NECA calculated each participating LEC's share of the CL pool in accordance with these data. Southwestern recorded revenue reflecting its share of that pool in Account 5082.

6. In December 1988, Southwestern reinstated its original study and reported adjusted data to NECA reflecting that study. This adjustment decreased Southwestern's monthly shares of the CL pool below the levels Southwestern had received. Southwestern apparently accounted for this decrease by reducing switched access revenue in Account 5082. Thereafter, on January 1, 1989, Southwestern implemented the mechanized process on which the revised study had been based.

III. DISCUSSION

7. We find Southwestern apparently liable for a forfeiture under Section 220(d) of the Communications Act for failure to keep its regulated books of account in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules. Section 32.4999 requires carriers to credit the appropriate revenue accounts when "revenue is actually earned"[7] and permits deductions from revenue only in certain defined circumstances. Southwestern was correct when it revised its circuit equipment study during

October 1988 and when it reported data to NECA reflecting that revision. Since the revised study was based on 1988 rather than 1986 data, it generated information on Southwestern's 1988 interstate circuit equipment costs that was significantly more accurate than the information generated by the prior study. Southwestern was also correct in recording CL revenue reflecting its October 1988 adjustment in Account 5082, since that revenue constituted the revenue Southwestern had actually earned for its switched access operations.

8. Southwestern, however, violated our rules in December 1988 when it reported adjusted data to NECA based on the original circuit equipment study and when it reduced revenues recorded in Account 5082 to reflect the adjusted data. Southwestern did not reinstate the original study because it believed the revised study defective. Indeed, Southwestern's implementation of its mechanized process on January 1, 1989, demonstrates that Southwestern considered the revised study more accurate than the original study, since that process generated the data on which the revised study was based. The December 1988 adjustment reduced Southwestern's share of the CL pool for December 1989. It also effectively reduced Southwestern's revenues for January through November 1988, since Southwestern had made that adjustment retroactive to January 1, 1988. When it recorded the impact of that adjustment in Account 5082, Southwestern was deducting revenues from that account.

9. Our rules, however, permit deductions from revenue only for "[c]orrections of overcharges, authorized refunds of overcollections previously credited to revenue, authorized refunds and adjustments on account of failure in service, and other corrections."[8] None of these circumstances applies here. The December adjustment did not correct for prior overcharges or other errors, was not an authorized refund of a prior overcollection, and was not in response to a failure in service. As a consequence, Southwestern made an improper and unauthorized deduction from revenues when it recorded the effects of the December adjustment in Account 5082. Accordingly, Southwestern apparently violated Sections 32.4099 and 32.5082 of our Rules in accounting for its transactions with NECA, and those violations continue to the present. The effects of using the erroneous allocator should have been recorded as nonoperating items in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

10. We are particularly concerned that Southwestern apparently knew that it was providing erroneous data to NECA in its December 1988 adjustment, but nevertheless proceeded with that adjustment. Southwestern appears to have done this as part of a concerted effort, in conjunction with other Subset I carriers,[9] to increase the CL pool's rate of return for 1988. Our investigation disclosed that certain officials of these Subset I companies, some serving on the NECA board of directors, became concerned when the NECA data for October 1988 showed an unexpected drop in that rate of return. These officials apparently concluded that the decreased earnings were caused primarily by large October 1988 adjustments that increased the amounts reported for the expenses and other taxes category of the CL pool. To offset these large adjustments, Southwestern, along with other Subset I carriers, apparently reported certain adjustments in December solely for the purpose of decreasing the costs in the expenses and other taxes category and, thereby, increasing the CL pool's rate of return for 1988.

11. We believe that Southwestern's conduct reflects a serious disregard for the integrity of the NECA reporting process and for our accounting rules. It is unacceptable for carriers to manipulate earnings by submitting erroneous data, or by otherwise undermining the reporting process prescribed by the Commission's rules. In this case, even though the increase in reported earnings benefited other carriers by giving them larger shares of the CL pool, Southwestern's conduct has raised doubts about the integrity of the CL settlement process and, in effect, represents an encroachment upon the Commission's authority. These are serious matters. Since Southwestern's failure to follow the prescribed method of accounting constitutes an apparent violation of Sections 32.4999 and 32.5082 of our Rules, we believe that a forfeiture is appropriate under Section 220 of the Act for failure to keep accounts in the manner prescribed by the Commission. Under the circumstances, we find Southwestern apparently liable for a forfeiture of $250,000. This forfeiture is being assessed for a continuing violation that began on or about January 31, 1989, and that continues to this day.

12. The knowing reporting of erroneous data is not part of any carrier's telecommunications operations, and Southwestern should not have recorded the effects of that reporting in a telecommunications revenue account. We tentatively conclude that Southwestern should have recorded those effects in Account 7360, Other nonoperating income, which encompasses all "items of income and gains or losses from activities not specifically provided for elsewhere" in our accounting rules.[10] We order Southwestern to show cause why such action should not be required.

13. Section 65.600 of the Commission's Rules[11] requires certain carriers, including Southwestern, to file Commission quarterly rate of return reports stating the carriers' total interstate revenues for the preceding calendar quarter. Southwestern's rate of return reports for 1988 apparently reflected its incorrect accounting practices and, therefore, understated its revenue for that year. We tentatively conclude that Southwestern should compensate for this apparent understatement by including the unreported revenue in its next quarterly rate of return report, and we also order Southwestern to show cause why such action should not be required.[12]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Southwestern Bell Telephone Company IS APPARENTLY LIABLE FOR FORFEITURE in the amount of $250,000 for failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules, 47 C.F.R. §§32.4999, 32.5082.

15. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause, Southwestern Bell Telephone Company shall pay the full amount of forfeiture in the man-

ner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. §1.80(h), or file a response showing why a forfeiture should not be imposed or should be reduced.[13]

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to record the effects of its erroneous reporting in Account 7360.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's Rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order to Show Cause why it should not be required to adjust its next quarterly rate of return report to include the understated revenue described above.

18. IT IS FURTHER ORDERED, that the Secretary shall send by certified mail a copy of this Notice of Apparent Liability for Forfeiture and Order to Show Cause to Southwestern Bell Telephone Company, 1010 Pine Street, St. Louis, Missouri 63101.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The other carriers are New England Telephone and Telegraph Co. (NET), New York Telephone Co. (NYT), and Pacific Bell (Pacific).

[2] 47 C.F.R. §§32.4999, 32.5082.

[3] 47 U.S.C. §220(d). Although we could assess larger forfeitures, after full consideration of the circumstances surrounding the violations, we exercise our discretion under Section 504(b) of the Act, 47 U.S.C. §504(b), to mitigate any additional amounts.

[4] We require the fourth carrier, Pacific, which made further adjustments during 1989, to show cause why it should not be required to withdraw those further adjustments.

[5] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834, *second further recon.*, 99 FCC 2d 708, *affirmed in principal part sub nom.*, National Association of Regulatory Utility Commissioners v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[6] General support facilities consist of assets, such as land, buildings, and general purpose plant, whose costs are recorded in Accounts 2111 through 2124 and Accounts 6111 through 6124.

[7] 47 C.F.R. §32.4999(d).

[8] 47 C.F.R. §32.4999(b).

[9] Subset I companies consist of the Bell System Operating Companies. 47 C.F.R. §69.602.

[10] 47 C.F.R. §32.7360(a). No other account provides specific instructions on where such effects should be recorded, since the Commission did not contemplate that carriers would proceed by knowingly reporting erroneous data to NECA when they wish to forego revenues that they have a right to retain.

[11] 47 C.F.R. §65.600.

[12] In accordance with Section 220(c) of the Communications Act, 47 U.S.C. §220(c), Southwestern will bear the burden of proving that its accounting entries for its transactions with NECA comply with the Commission's accounting rules. New York Telephone Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 866, 871 (1990).

[13] Such forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington D.C. 20554.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: NECA Audit Report, Related Notices of Apparent Liability and Letter of Reprimand, and Requests for Confidential Treatment of Certain Financial Information

Today, the Commission adopted Notices of Apparent Liability regarding actions four carriers took at the direction of the National Exchange Carrier Association (NECA). In addition, we are issuing a letter to the NECA Board of Directors that indicates our intention to consider adopting rule changes that will substantially restructure NECA's processes. At the same time, we state our intention to release the audit report regarding NECA's activities.

I will concur in the decision to assess $250,000 fines on each of these carriers because I believe the violations in this case justify, in fact demand, the assessment of the maximum fine. What these carriers did in this case may seem to be rather "harmless" on its face because they appear to have "given money away." Once one scratches beneath the surface of this case, however, it is clear that the NECA Board of Directors intended to manipulate the FCC's processes to achieve unstated and potentially unlawful ends.

NECA may have made the small carriers "whole" by telling its larger member companies to "cook the books" so that the small companies would earn no less than the then authorized rate of return on common line access service. The problem with this action by the NECA Board is that it blatantly subverted the Commission's processes and policies. Indeed, NECA acted in clear defiance of both the codified rules and the apparent direction of Commission staff.

It is this sort of underhanded action that in my mind constitutes the greatest violation of the Commission's rules. Even if we could not find that any specific sum of

money (whether substantial or minimal) were unlawfully charged to ratepayers as a result of this action by NECA, its decision to violate the FCC's rules and its possible intention to deceive Commission staff to achieve political or other goals cannot go unpunished. For these reasons, I would prefer to assess the maximum fine on each of these carriers, but I will concur in the Commission's action in this case. I hope that this level of forfeiture will discourage further wrongdoing by carriers under the Commission's jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 9, 1990

Released: November 9, 1990

Lawrence C. Ware
Chairman of the Board of Directors
National Exchange Carrier Association, Inc.
100 South Jefferson Road
Whippany, New Jersey 07981

Dear Mr. Ware:

The Common Carrier Bureau has completed an audit of the National Exchange Carrier Association, Inc. (NECA) that focused on the settlement process and certain adjustments to the Common Line pool during the last quarter of 1988. Today, based on that report, we are issuing *Notices of Apparent Liability for Forfeiture and Orders to Show Cause* against four Subset I telephone companies for violations of this Commission's accounting rules.

The auditors found instances in which several Subset I companies apparently engaged in erroneous and manipulative reporting that influenced Common Line earnings in 1988. These actions have been traced to an apparent attempt by several NECA directors to manage NECA Common Line earnings. The details of these actions are contained in the audit report which we are authorizing the Bureau to release to the public. This letter expresses our grave concern about this matter and our firm view that it is unacceptable for NECA members to influence NECA earnings and other calculated results by incorrectly introducing or withholding data, or by otherwise manipulating the reporting process prescribed by our rules.

The NECA Board of Directors has the responsibility and duty to ensure that the final settlement figures reached by NECA reflect the actual financial results of providing access services. We are particularly concerned that the instances uncovered by our auditors appear to have emanated from the actions of several NECA directors. We conclude that these directors apparently failed to ensure the accuracy of the data reported to NECA. We also believe that the NECA Board of Directors, as a whole, did not display the vigilance that should have disclosed and restrained the actions of the directors involved in these instances.

We believe that NECA must take a number of actions to restore public confidence in its processes. First, because the adjustments forming the basis of our *Notices of Apparent Liability for Forfeiture and Orders to Show Cause* may have been part of a larger pattern of misconduct, we require that NECA retain an independent auditor to review each individual adjustment of $100,000 or more that the Subset I carriers reported to the Common Line pool for 1988 and 1989, other than the adjustments addressed in the Bureau's audit report. This review shall include adjustments reported after the Subset I carriers left that pool on April 1, 1989. The independent auditor shall examine the basis for each such adjustment as well as the effect of each such adjustment on the individual carrier's proceeds from the Common Line pool and overall Common Line earnings for 1988 and 1989. Within sixty (60) days of the release date of this letter, NECA shall file with this Commission a preliminary report describing the steps taken in response to this requirement. Within one hundred eighty (180) days of that release date, NECA shall file with this Commission a final report stating, in addition to the information described above, the independent auditor's opinion as to the accuracy of the data forming the basis for each adjustment considered in its review.

We also require that NECA retain an independent auditor to recommend safeguards to prevent further instances of this nature. Within sixty (60) days of the release date of this letter, NECA shall file with this Commission a report describing the steps taken in response to this requirement. Within one hundred eighty (180) days of that release date, NECA shall file with this Commission a final report describing the auditor's recommendations, the steps NECA has taken or intends to take in response to those recommendations, and a timetable for taking any additional steps.

The costs of complying with the above requirements are to be billed to all the Subset I companies with explicit instructions that the costs are to be charged below the line in Account 7360, Other nonoperating income. We will take whatever action we deem appropriate upon receipt of the reports. One action we intend to consider as part of our overall reevaluation of the NECA process would expand the NECA Board of Directors to include two or more members from outside the local exchange carrier industry. We believe that these directors would provide an independent view and have a moderating effect on Board deliberations.

Finally, because the settlement cycle has not expired for the adjustments that we found to be improper, three of the carriers could seek now to recover additional revenues from the Common Line pool by making adjustments that reverse the effect of submitting erroneous data in 1988. We hereby instruct NECA not to accept any such adjustment.

This letter was adopted by the Commission on November 9, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

NEW ENGLAND TELEPHONE AND TELEGRAPH CO.

NEW YORK TELEPHONE CO.

PACIFIC BELL

SOUTHWESTERN BELL TELEPHONE COMPANY

Requests for Confidential Treatment of Certain Financial Information

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1990; Released: November 9, 1990

By the Commission:

1. The National Exchange Carrier Association, Inc. (NECA), New England Telephone and Telegraph Co. (NET), New York Telephone Co. (NYT), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern) request confidential treatment of certain financial information submitted to the Commission staff during a recent Common Carrier Bureau audit of adjustments reported to the Common Line (CL) pool administered by NECA. At the conclusion of its audit, the Bureau prepared a report which contains findings, conclusions, and recommendations concerning those adjustments. This audit report necessarily is based on information obtained from NECA and the carriers during the course of the audit. The report itself summarizes and analyzes information, including financial data, that is subject to NECA's and the carriers' requests for confidentiality.[1] For the reasons set forth below, we deny the requests for confidential treatment to the extent such material is contained in the audit report, and we authorize the Bureau to release the audit report to the public pursuant to Section 220(f) of the Communications Act of 1934, as amended.[2]

2. Section 0.459 of the Commission's rules provides that any party submitting information to the Commission may request that the information be kept confidential. [3] A party seeking confidential treatment must demonstrate by a preponderance of the evidence that nondisclosure is consistent with the provisions of the Freedom of Information Act (FOIA).[4] The confidentiality requests submitted by NECA and the carriers, to the extent they are articulated, are grounded in Exemption 4 of the FOIA,[5] and the Commission's implementing rules, Section 0.457(d).[6] Exemption 4 and, in turn, Section 0.457(d) of the rules, permit the Commission to withhold from inspection "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial materials are held to be confidential when disclosure would be likely to cause the party submitting those materials substantial competitive harm, or to impair the government's ability to obtain necessary information in the future.[7]

3. To justify withholding information under the competitive harm prong of this test, it is not necessary to show actual competitive harm. Rather, the entity or person seeking confidentiality must show that substantial competitive injury is likely to result from disclosure.[8] While an elaborate economic analysis need not be made to establish the likelihood of substantial competitive injury, "conclusory and generalized allegations" cannot support nondisclosure.[9] Moreover, public embarrassment, unfavorable publicity, or customer disgruntlement are not generally considered to constitute substantial competitive harm.[10]

4. Assuming that the carriers face competition in the areas covered by the audit, a matter we need not decide here, we conclude that release of the audit report is not likely to result in substantial competitive harm. The report contains no specific commercial and financial information relating to individual products or services; rather, the report consists of narrative information regarding the NECA settlement process, aggregate data regarding that process, and the amount of and other information regarding a limited number of data adjustments NET, NYT, Pacific, and Southwestern reported to NECA.[11] The nature of this data and other information diminishes significantly the likelihood that the carriers would suffer substantial competitive injury as a result of disclosure of the audit report. For instance, while the audit report states that Pacific adjusted, by a particular amount, the "Expenses and Other Taxes" it reported to the CL pool for the December 1988 settlement cycle, that figure would not be especially useful to any competitors in pricing their own products or services or devising competitive initiatives to challenge Pacific. Since that figure encompasses a wide range of expenses that are incurred in connection with Pacific's interstate access services, it would not help the competitors to learn the nature or magnitude of the costs Pacific incurs in connection with any particular product or service.

5. In determining whether disclosure of the audit report is likely to impair our ability to obtain necessary information in the future, we assess the effect disclosure would have on the integrity and efficiency of our audit processes. While we have statutory authority to compel production of information required for those processes, we have recognized that the cooperation of subject carriers is a valuable element in the orderly conduct of our audits.[12] This cooperation has extended to a willingness to permit examination of preexisting company records, allow employee interviews, and prepare new documents that otherwise might not have been created. We have held that the disclosure of raw data submitted by carriers during an audit would be likely to impair our future ability to obtain such data.[13]

6. Because of the nature of the information in the audit report, we conclude that the report's disclosure is unlikely to impair our ability to obtain necessary information in the future. That report is a focused distillation of a wealth of information. The portions of the report that are based

on information obtained from NECA and subject carriers are restricted to explanation and analysis of the overall NECA process and of a limited number of data adjustments NET, NYT, Pacific, and Southwestern reported to NECA. Although provided directly by NECA and the carriers, the amounts of these data adjustments are themselves aggregate figures reflecting a number of transactions and are therefore comparable to the summary data released as part of our audit report regarding NYT and Materiel Enterprises Company rather than to the underlying raw data that was withheld in connection with that proceeding.[14] The focused nature of this material significantly diminishes the possibility that disclosure of the report will reduce carrier cooperation in future audits.

7. In any event, in the circumstances and given the diminished likelihood of substantial competitive harm or impairment of our ability to obtain necessary information, we believe that there is a compelling public interest in the disclosure of the audit report. The audit report serves as the basis for *Notices of Apparent Liability for Forfeiture and Orders to Show Cause* against NET, NYT, Pacific, and Southwestern for violating the Commission's rules in accounting for the transactions described in the audit report. Ratepayers have a vital interest in the conduct and outcome of these proceedings. The data these carriers reported to NECA in connection with these transactions were used to distribute amounts in the CL pool among NECA members. Release of the audit report is necessary to inform interested state regulatory commissions and consumers concerning the circumstances surrounding and implications of NET's, NYT's, Pacific's, and Southwestern's actions in connection with these transactions.[15]

8. We note that this *Order* does not evaluate the sufficiency of the carriers' and NECA's requests for confidentiality with respect to the raw financial data and other information on which the audit report is based, other than that which is contained in the audit report, or of other such information obtained during the course of the audit, because those issues have not been presented. To the extent that those requests may be construed as objections to the disclosure of the information contained in the report, we deny them.

9. Pursuant to Section 0.459(g) of the Commission's Rules,[16] NECA, NET, NYT, Pacific, and Southwestern will be afforded five working days in which to seek a judicial stay of this Commission ruling. We direct the Chief, Common Carrier Bureau, immediately upon Commission release of this Order, to furnish by telephone to NECA, NET, NYT, Pacific, and Southwestern notice of our determination and of the time for seeking judicial stay, as well as follow up notices in writing and copies of the relevant portions of the audit report, as set forth below.

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459 (1989), that the requests of the National Exchange Carrier Association, Inc., New England Telephone and Telegraph Co., New York Telephone Co., Pacific Bell, and Southwestern Bell Telephone Company for confidential treatment of certain financial information submitted in connection with the Common Carrier Bureau audit ARE DENIED to the extent necessary to release the data and other information contained in the Bureau's audit report.

11. IT IS FURTHER ORDERED, pursuant to Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j), that a copy of this *Order* and the portions of the audit report that relate to the National Exchange Carrier Association, Inc., New York Telephone Co., New England Telephone and Telegraph Co., Pacific Bell, and Southwestern Bell Telephone Company shall be served upon each respective company.

12. IT IS FURTHER ORDERED, pursuant to Section 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(f), and Section 0.459(g) of the Commission's Rules, 47 C.F.R. § 0.459(g) (1989), that the Common Carrier Bureau is authorized to release the audit report for public inspection on the sixth working day following service of portions of the audit report relating to the National Exchange Carrier Association, Inc., New York Telephone Co., New England Telephone and Telegraph Co., Pacific Bell, and Southwestern Bell Telephone Company upon each respective company.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] NECA submitted its request on behalf of its member carriers. *See* Letter from James W. Frame, Director - Tariff & Regulatory Matters, NECA, to Robert E. Hood, Deputy Chief, Audits Branch, Accounting and Audits Division, FCC (Mar. 27, 1989).

[2] 47 U.S.C. § 220(f).

[3] 47 C.F.R. § 0.459 (1989).

[4] 5 U.S.C. § 552.

[5] 5 U.S.C. § 552(b)(4).

[6] 47 C.F.R. § 0.457(d) (1989).

[7] National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*).

[8] *See* Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979); *National Parks I*, 498 F.2d 765.

[9] National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 680-81 (D.C. Cir. 1976) (*National Parks II*).

[10] CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987); General Electric Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984).

[11] Neither NECA nor the carriers allege that the information constitutes "trade secrets" under Exemption 4.

[12] J. David Stoner, FCC 90-329, slip op. at 6-8 (released October 19, 1990); Martha H. Platt, 5 FCC Rcd 5742 (1990); Scott J. Rafferty, 5 FCC Rcd 4138, 4138, para. 5 (1990).

[13] J. David Stoner, *supra*, slip op. at 7; Scott J. Rafferty, 5 FCC Rcd at 4138, para. 5; Western Union Telegraph Co., 2 FCC Rcd 4485 (1987).

[14] *Compare* New York Telephone Co., Request for Confidential Treatment of Certain Financial Information, 5 FCC Rcd 876 (1990) *with* J. David Stoner, *supra*, and Scott J. Rafferty, *supra*.

[15] Commission audit reports concerning common carriers are made available for public inspection only in "exceptional" cases. *See* Martha H. Platt, 5 FCC Rcd at 5743, n.8, *citing* New York

Telephone Co., *supra*. While concluding that this is such an exceptional case, we wish to make clear that our general policy is to preserve the confidential status of audit reports. Further, although we have determined that, given the particular nature of these proceedings and the specific information at issue, public disclosure is warranted here, we do not intend publicly to disclose every audit report that culminates in enforcement proceedings. A variety of factors may influence whether we exercise our discretion to disclose audit reports, including the nature and seriousness of the alleged violation, the nature of the confidential staff recommendations contained in the report, and the effect disclosure might have on our ability to carry out enforcement action.

[16] 47 C.F.R. § 0.459(g) (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Services for
Hearing-Impaired and Speech-Impaired
Individuals, and the Americans with
Disabilities Act of 1990

NOTICE OF PROPOSED RULE MAKING

Adopted November 8, 1990; Released November 16, 1990

By the Commission:

I. INTRODUCTION

1. This proceeding is initiated because of the passage of the Americans with Disabilities Act of 1990 (ADA), S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (1990). The ADA's purpose is "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities."[1] Title IV of the ADA adds new Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, (the Act), and amends existing Section 711.[2] Section 225 requires the Commission to promulgate regulations in furtherance of the purposes of the ADA. [3]

2. The Act mandates that communications services be "[made] available, so far as possible, to *all* the people of the United States . . . ." 47 U.S.C. § 151 (emphasis added). Many of the nation's 26 million hearing and speech impaired are unable to access fully the nation's telephone system; for them universal service has not been achieved.[4] The intent of Title IV of the ADA is to further the Act's goal of universal service by providing to hearing and speech impaired individuals telephone services that are functionally equivalent to those provided to hearing individuals. To accomplish this, new Section 225 imposes on all common carriers providing interstate or intrastate telephone service an obligation to provide to hearing and speech-impaired individuals telecommunications services that enable them to communicate with hearing individuals.[5] The ADA requires the Commission to establish functional requirements, guidelines, and operational procedures for relay services, and to establish minimum standards that shall be met in carrying out the requirement that common carriers provide telecommunications relay services. The Commission's regulations are to require that telecommunications relay services operate every day for 24 hours per day, require that users of telecommunications relay services[6] pay rates not greater than rates paid for functionally equivalent voice communications services, prohibit relay operators from refusing telecommunications relay service calls or limiting their length, prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of such conversations beyond the duration of the call, and prohibit relay operators from intentionally altering a relayed conversation. 47 U.S.C. §225(d)(1). In addition, the Commission must ensure that its regulations' use of existing technology does not discourage or impair the development of improved technology. 47 U.S.C. § 225(d)(2). The Commission also is charged with prescribing regulations governing the jurisdictional separation of costs for the services provided pursuant to Section 225, subject to certain conditions; resolving complaints alleging violation of Section 225; and certifying state programs for intrastate telecommunications relay services. 47 U.S.C. §§ 225 (d)(3), (e), (f). The proceeding will culminate in the issuance of regulations that establish functional standards for the provision of telecommunications relay services.

II. BACKGROUND

3. The Commission has considered the need for relay services even before passage of the ADA. In CC Docket No. 87-124, the Commission sought public comment concerning the telecommunications needs of the hearing impaired and other disabled persons, to evaluate the need for regulatory measures or legislative initiatives to ensure reasonable access to telecommunications services by those persons.[7] The Commission considered a variety of issues in the Notice, including the Commission's jurisdiction to order an interstate relay system, if it found one is necessary, options on how it should be provided, options for recovering its costs, and other issues such as standardization of the TDD signalling format, the feasibility of developing packet switched services to provide low cost connectivity for TDD users and the need for an advisory committee to address the needs of the disabled.

4. In the subsequent *Order Completing Inquiry and Providing Further Notice of Proposed Rule Making* (Further NPRM), 4 FCC Rcd 6214 (1989), the Commission found, *inter alia*, that an interstate TDD relay service is necessary to provide reasonable access to telephone service to the hearing and speech impaired. It proposed for comment two alternative plans designed to accommodate interstate TDD relay service. The first would require interexchange carriers (IXCs) which have more than 0.05 percent of presubscribed lines to separately or jointly provide the service. Under this plan, the carriers would be permitted to recover their costs through charges for other interstate services. The alternative plan called for the National Exchange Carrier Association (NECA) to assume the responsibility for implementation and operation of the system. Funding for this plan would be covered by an assessment on IXCs, *i.e.*, those meeting the 0.05 percent presubscribed line criterion, based on each carrier's number of presubscribed common lines, and adding those costs to the Universal Service Fund costs.[8] In either case, there would have been no additional charge for users of the interstate TDD relay service beyond the normal end-to-end toll charges of the serving carrier.

5. In the Further NPRM, the Commission reached conclusions on several matters raised in the Notice. It concluded, for example, that standardizing the TDD signalling format[9] is unwarranted. It said that the ASCII format "would impose an unnecessary burden on owners of the Baudot devices." Further NPRM at 6225-26. This is particularly so, it noted, in view of the ability of existing relay centers to accept signals in either format, and the common ability of ASCII machines to accept Baudot. The Commission also decided that packet switching for TDD users has not been identified as a technology warranting Commission action. The Further NPRM also concluded that a formal, Commission-sponsored advisory committee is unnecessary to address the needs of the disabled. Further NPRM at 6231.

6. The provisions of the ADA, which was enacted after comments to the Further NPRM were filed with the Commission, have rendered much of the record in CC Docket No. 87-124 inapplicable. Issues raised by the Commission in CC Docket No. 87-124 concerning TDD relay services have been supplanted by the provisions of the ADA. In the sections that follow, the record of CC Docket No. 87-124 will be included to the extent it may be of help in formulating proposals to implement the statutory requirements of the ADA.[10]

III. PROPOSED RULES

7. Section 225(c) of the ADA requires that carriers providing telephone voice transmission services provide telecommunications relay services (TDD service) within three years of the date of enactment of Title IV of the ADA, *i.e.*, July 26, 1993.[11] Carriers are to offer to hearing-impaired and speech-impaired individuals telephone transmission services which are functionally equivalent to telephone services provided to hearing individuals, including providing services within the same geographic radius that they offer to hearing individuals.[12] Carriers may provide such services individually, through designees, through a competitively selected vendor, or in concert with other carriers, but it is carriers that are responsible for compliance. Although carriers are provided considerable discretion as to how they provide the service, there is no provision in the statute for waiver of the requirement.[13]

8. Section 225(a)(1) of the ADA defines common carrier for purposes of telecommunications services for hearing-impaired and speech-impaired individuals as including the definition currently contained in Section 3(h) of the Act "and any common carrier engaged in intrastate communication by wire or radio . . . ." The Commission's jurisdiction under the ADA, therefore, extends to all telephone companies and their compliance with their statutory obligations under Section 225(b)(1), to provide to hearing and speech impaired individuals telecommunications services that enable those individuals to communicate with hearing individuals. Although the Commission's jurisdiction is over all common carriers, states may seek to establish that intrastate relay services satisfy federal requirements by applying to the Commission for certification. If a state system is certified by the Commission, a state retains jurisdiction over such intrastate systems. The Commission retains jurisdiction over intrastate systems where a state has not been certified or when certification has been revoked. Interstate carriers, and intrastate carriers in states who have not been certified, must comply with the Commission's regulations. Intrastate carriers in states that have been certified must provide intrastate TDD service in compliance with the program certified under Section 225(f) for that state. The definitions, jurisdictional statement, and essential service requirements of Section 225 are set forth in proposed Sections 64.605(a), (b) and (c) of the rules.

9. Section 225(d) of the ADA requires the Commission to prescribe the necessary rules and regulations to carry out the requirements of Title IV, within one year of that ADA's enactment. Subsection (d)(1)(A) requires the Commission to establish functional requirements, guidelines, and operational procedures for the provision of telecommunications relay services. One of the requirements of the ADA is that all common carriers subject to the ADA must provide TDD services on a nondiscriminatory basis to all users in their telephone service areas. The Commission is under a mandate to pursue means to meet this goal in the most efficient manner.[14]

10. As an initial matter, we believe it would be premature at this time to prescribe how carriers meet their responsibilities under the ADA. Section 225 provides carriers discretion as to whether service is provided individually, jointly, or through designees, and they must have time to evaluate which approach is best. Moreover, more than 17 state sanctioned systems are in operation, some of which offer an interstate calling capability, and state authorities need time to consider what modifications should be made in view of the ADA. Although the Commission ultimately may need to prescribe a structure, doing so at this time would be inconsistent with the statutory design to permit carriers and states time to determine how to comply with the Commission's rules.

11. In response to the ADA's directives concerning functional requirements, guidelines and operational procedures, we propose that operators of TDD relay systems should be sufficiently trained to meet the specialized communications needs of individuals with hearing and speech impairments, including sufficient skills in typing, grammar and spelling. Additionally, operators should be trained in deaf culture and TDD etiquette, and should be able to interpret typewritten American Sign Language and transliterate it to spoken English, and vice versa. Further, the relay systems should include adequate staffing to provide callers with reasonably efficient access,[15] and on request operators should retry calls that are initially busy. Finally, operators should be prepared to handle emergency calls from disabled callers. Accordingly, we propose Section 64.605(d)(1)(A) which will require relay systems to operate with sufficient trained personnel. Interested parties are invited to comment on the language of this proposal, and to offer additional functional requirements, guidelines and operational procedures for telecommunications relay services. Interested parties are also invited to propose analogous standards or amendments to accommodate systems that are automated, *i.e.*, systems that do not require the intervention of an operator to provide translation between audio and video.[16] Parties should explain how such systems are "functionally equivalent" to systems provided to voice users.

12. Section (d)(1)(B) of the ADA requires the Commission to establish minimum federal standards to be met by all providers of intrastate and interstate telecommunications relay services including technical standards, quality of service standards, and the standards that will define functional equivalence between telecommunications relay

services and voice telephone transmission services. *See also* S. Rep. at 81. The objective is to ensure that telephone service for hearing-impaired and speech-impaired individuals is functionally equivalent to voice service offered to hearing individuals. Factors that we will include in our proposed rule Section 64.605 to achieve the goal of Section (d)(1)(B) are the requirements that TDD systems transmit messages between the TDD and voice caller in real time, that blockage rates for TDD services be no greater than standard industry blockage,[17] and that users have access to their chosen interexchange carrier to the same extent access is provided to voice users. Appendix B at 64.605(d)(1)(B). We do not propose to adopt a single signal format. The Commission discussed standardizing TDD signalling format in the Further NPRM, (para. 5, *supra*), but that approach was not supported in the record. Further NPRM at 6225-26. While ASCII offers a higher data transfer rate, not all TDD users have compatible equipment, relying instead on Baudot code equipment. However, Baudot and ASCII formats are the standard signalling formats in use now by TDD users. We will propose, as we did in the Further NPRM, to require that TDD relay systems be capable of communicating with either format.[18] Interested parties are invited to propose other standards that will define functional equivalence between TDD relay services and voice telephone services.

13. Section 225(d)(1)(C) requires that TDD relay services operate every day for 24 hours a day. A similar proposal was offered in the Further NPRM with regard to an interstate TDD relay system and no party expressed opposition. Under the ADA, the requirement for all intrastate TDD relay systems also would reflect the 24 hour, seven days a week availability of service. A small intrastate carrier might consider the costs of operating such a system to be prohibitive if it has few disabled subscribers in its service area. Although the ADA provides no exceptions to its requirement that every voice carrier provide TDD relay service, carriers are free to enter into joint arrangements. In a state that has certified its TDD relay program under Section 225(f), the carrier will be subject to the operating and funding requirements of Section 225(d) through the state program. It is likely states will consider the variety of carriers under their jurisdiction and will seek to minimize hardships on small carriers in implementing effective, efficient, intrastate relay systems. A carrier in a state that has not certified a TDD relay program with the Commission is still required to comply with the requirements of Section 225(d), which include operating standards, but we encourage carriers to consider joint operations so that service can be provided as efficiently as possible. It would be premature at this point to compel small carriers to enter into federally structured joint arrangements, although ultimately some action along that line may be necessary. For now, we leave it up to the carriers to develop effective, efficient relay systems consistent with our rules and the ADA. We only propose that subsection (d)(1)(C) of Section 64.605 of the rules require that all TDD relay services operate in accordance with the standard established by Section 225(d)(1)(C) of the ADA. We also propose to require that TDD relay systems be designed to permit operation during power outages. Interested parties are asked to comment on this proposal.

14. Subsection (d)(1)(D) of Section 225 requires that users of TDD relay services pay rates no greater than the rates paid for functionally equivalent voice communication with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination. As was noted in the Further NPRM, TDD relay calls consist of two primary additional elements: (1) communications links between the relay center and the caller and called party and (2) the relay center. The Commission stated that requiring relay users to pay the relay center costs would act as a deterrent to use of the service because the full cost of a relay call could be as much as $9.20 for an average call. Further NPRM at p. 6222. The Commission proposed that the added cost of providing interstate relay service be recovered from sources other than relay service users, so that users would pay a charge equal to the tariffed rates of non-relay calls between the same locations of the interexchange carrier providing the communications links for the relay service. Parties commenting in response to this proposal did not oppose the notion of direct call equivalence, *i.e.*, functionally equivalent communication services.[19] Proposed Section 64.605(d)(1)(D) of the rules reiterates the mandate of Section 225(d)(1)(D) that carriers' charges for TDD relay service not exceed charges for functionally equivalent voice service between the same end points, without regard to how the call is routed.

15. Section 225(d)(1)(E) prohibits relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use TDD relay services. By this provision relay operators appear required to handle any type of call provided by carriers, *e.g.*, non-coin sent-paid,[20] third party number, calling card and collect calls.[21] Interested parties are asked to submit comments in response to proposed subsection 64.605(d)(1)(E).

16. Section 225(d)(1)(F) prohibits relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call. It is noted by the Senate Report that while records have to be made to complete a call no such records of the content of the call should be retained after the call has been terminated.[22] One adjunct to real-time TDD relay operation is "store and forward" service. By this service, if the destination telephone number is busy when the disabled person makes his or her initial call through the TDD relay operator, the operator will deliver the message at a later time when the destination telephone is no longer busy. Under these circumstances, it would seem that a stored and forwarded call is, for purposes of subsection (d)(1)(F), not completed and the prohibition against "keeping records of the content . . . beyond the duration of the call" would not apply until the message is finally delivered.[23] Were delivery not possible, under reasonable criteria established by the relay center, the originating caller would be notified and the message destroyed, typically by deleting it from the relay center's computer memory. Our proposed Section 64.605(d)(1)(F) includes only the language offered by the ADA provision, but parties are invited to offer additional language to clarify the intent of the section as discussed herein.

17. Section 225(d)(1)(G) prohibits relay operators from intentionally altering a relayed conversation. This requirement raises a number of potential problems. First, there may be times when summaries are reasonably necessary and these should not violate the prohibition of subsection (d)(1)(G). For example, the Senate Report recognizes that some recorded messages cannot necessarily be transcribed in full due to speed limitations in the dispatching TDD

and the operator's typing ability, in which case the hearing or speech impaired individual should be given the option to have the message summarized.[24] However, should the customer choose not to accept a summarized version of the message, the operator apparently would have to be facile with shorthand or have access to a tape recorder to transmit the message in full. Offering this option, therefore, could impose an unnecessary and unreasonable burden on operators. An alternative would be to permit operators to summarize the content of recorded messages if reasonably necessary by message length or content. We ask interested parties to comment on this matter and to provide anticipated costs and benefits in support of their positions. The purpose of the section is to assure that the relay operator, to the extent reasonably possible, serves as a transparent conduit between two people communicating through disparate modes, and we believe operators must be provided reasonable discretion in meeting that responsibility. A second issue that arises by this process is the responsibility of the relay operator to repeat language or expressions that are either abhorrent to his or her sensibilities or convictions or are otherwise violative of state or federal law, *e.g.*, those that are obscene or involve criminal activity that the operator would wish to report to authorities. Our view is that Congress has mandated that relay operators may not intentionally alter a relayed conversation, no matter what that conversation contains, or reveal its contents. Interested parties are invited to comment on this issue and to submit their views on proposed Section 64.605(d)(1)(G), which follows the language of ADA Section 225(d)(1)(G).

18. Section 225(d)(2) requires the Commission to ensure that regulations prescribed to implement Title IV of the ADA encourage the use of state-of-the-art technology and do not discourage or impair the development of improved technology. As noted, *supra*, the Commission considered in the Notice the feasibility of developing packet switched services based on new or existing packet switched networks to provide low costs connectivity to TDD users. Notice at 1988. However, the record in response to this issue was insufficient to reach a conclusion, though one party did describe a service which, it asserted, would permit use of compatible equipment on a circuit switched or packet switched basis through the use of modems and PCs.[25] Other technologies, such as those utilizing text-to-speech and voice recognition concepts, may eventually represent alternatives to relay centers. The Commission will remain receptive to petitions for Rule Making to modify the rules to be adopted in this proceeding that offer technological advancements more efficiently fulfilling the objectives of the ADA. Proposed Section 64.605(d)(2) is intended to reflect the intent of Section 225(d)(2).

19. Section 225(d)(3)(A) requires the Commission to prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to Title IV of the ADA, consistent with the provisions of Section 410 of the Act. The legislative history establishes that "No change to the procedures for allocating joint costs between the interstate and intrastate jurisdictions as set forth elsewhere in the Communications Act of 1934 is intended."[26] The Commission, under Section 410(c) of the Act, must refer "any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed Rule Making" to a Federal-State Joint Board.[27] Section 410 also authorizes the Commission to "refer any other matter, relating to common carrier communications of joint Federal-State concern" to a Joint Board. A Joint Board may not be necessary if state relay systems operate independently of any interstate relay system, *i.e.*, under circumstances in which there are no jointly used resources. Conversely, carriers conceivably could elect to enter into a single relay system which provides inter- and intra-state relay service throughout the country. Moreover, 'the ADA, through Section 225(a)(1) and relevant legislative history,[28] expands the range of services and carriers responsible for providing relay services beyond those normally subject to separations procedures. These include resale carriers, cellular radio carriers, and all other carriers which provide voice-band telecommunications services.[29] We ask interested parties to consider the extent to which the ADA, Section 410 of the Act and current accounting and jurisdictional separations regulations apply to the panoply of carriers currently offering voice services, to comment on changes needed in the rules in this regard, if any, including Parts 32, 36 or 69, and to recommend schedules and procedures for implementing any proposed changes, considering the time limitations contained in the ADA.[30] Our proposed Section 64.605(d)(3)(A) sets forth the basic requirement that appears in the ADA with regard to jurisdictional separations.[31] Parties may comment on this proposal or offer any other language that supports the intent of the ADA. Such new proposals should be supported with data, where appropriate, and detailed rationale.

20. Section 225(d)(3)(B) states, *inter alia*, that the Commission's "regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service." The ADA contemplates that the Commission's regulations will ensure that all subscribers to every telephone common carriers' interstate service, including private line, public switched network services, and other common carrier services, will contribute to recover the costs incurred in the carrier's provision of interstate relay services.[32] In its Further NPRM, the Commission sought comment on two mechanisms for financing an interstate TDD network, one requiring IXCs to recover costs through charges for other interstate services, and the other implemented through NECA which would recover the costs through a line charge to interexchange carriers. *See* para. 4, *supra*.

21. The ADA has fundamentally broadened the relay services addressed earlier to include intrastate services, and instructs that interstate relay services should be supported by subscribers to all interstate services. The record in response to the Further NPRM no longer adequately addresses the matter of funding TDD relay systems. Nevertheless, it remains possible that mechanisms similar to those proposed earlier or one implemented through NECA or another industry organization, could achieve the intent of Congress. We ask interested parties to comment on precisely what additional detail, if any, may be necessary in Commission rules relating to cost recovery. We ask such commenters to analyze the extent to which these or other proposed mechanisms distribute costs as required by the ADA, and to provide anticipated cost figures for the first five years of TDD relay system operation.[33]

22. Section 225(d)(3)(B) provides that a state which has a program certified under Section 225(f) shall permit its commission to allow a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of Title IV. Our proposed Section 64.605(d)(3)(B) requires, *inter alia*, that the costs for TDD relay service provided by interstate carriers will be recovered from all subscribers for every interstate service, and costs caused by intrastate TDD relay services will be recovered from the intrastate jurisdiction. This language follows the approach outlined by the ADA, but, as discussed in the previous paragraph, we ask interested parties to comment on alternatives to cost recovery that are consistent with the ADA and the Act.

23. Section 225(e) addresses the matter of enforcement of the ADA. Section 225(e)(1) requires that the Commission enforce the requirements of the ADA subject to subsections (f) and (g). Subsection (f) refers to the certification of state programs, and subsection (g) provides for Commission resolution of complaints concerning the ADA. The purpose of Section 225(e)(1) is to assure that the Commission has adequate enforcement authority to ensure that TDD relay services are provided nationwide and in every state and that certain minimum federal standards are met by all providers of the services. The Commission's enforcement authority over the provision of intrastate TDD relay services is limited in states with programs certified under procedures required to be established under subsection (f). The ADA requires that state commissions permit common carriers to recover the costs incurred in providing intrastate TDD relay services if the carrier meets the requirements of the state's certified program. In states without such a program, the ADA requires state commissions to permit the recovery of costs as long as the carrier complies with the Commission's regulations adopted pursuant to Section 225(d). Section 225(e)(2) requires the Commission to resolve a complaint alleging a violation of Section 64.605 within 180 days after the complaint is filed. Subsections (e)(1) and (2) are reflected in proposed Section 64.605(e). *See* Appendix B.

24. Sections 225(f)(1) and (f)(2) describe the state certification procedure by which states may apply to assert jurisdiction over the provision of intrastate TDD relay services. The Commission may grant certification on a showing that these services comply with the federal guidelines and standards adopted pursuant to Section 225(d) of the ADA. A state plan may make service available through the state governments, through designees, through a competitively selected vendor, or through regulation of intrastate carriers. To obtain certification, a state must submit documentation to the Commission that includes procedures and remedies for enforcement. This is to assure that states with certified plans will exercise their responsibility to enforce the provisions of Title IV of the ADA in their jurisdictions.[34] Section 225(f)(3) states that, except as provided by rules promulgated pursuant to Section 225(d) of the ADA, the Commission may not refuse to certify a state program based solely on the method the state chooses to fund implementation of intrastate TDD relay services.[35] Section 225(d), however, would require that a state program not include cost recovery mechanisms that would have the effect of requiring users of TDD relay services to pay higher rates than those paid for functionally equivalent voice communications services. *See* ADA Sections 225(d)(1)(D) and (d)(3)(B). We propose certification procedures in Appendix B, at proposed 64.605(f). The House Report notes that TDD relay services are of benefit to all in society and it therefore "would expect that any funding mechanism not be labeled so as to prejudice or offend the public, especially the hearing-impaired and speech-impaired community."[36]

25. By Section 225(f)(4), the Commission may suspend or revoke a state's TDD relay service certification if, after notice and opportunity for hearing, it determines that certification is no longer warranted. In a state whose program has been suspended, the Commission is expected to provide a reasonable transition period to ensure continuity of TDD relay service for users and a reasonable opportunity for carriers to meet the requirements of the Commission's regulations after the suspension or revocation. Proposed Section 64.605(f) contains the provisions of ADA Section 225(f). Interested parties are invited to offer comments on these proposals and to include any additional language they deem appropriate.

26. Section 225(g) states that when a complaint is filed with the Commission alleging a violation of Title IV of the ADA with respect to intrastate TDD service within a state that has a certified program under Section 225(f) in effect, the Commission must refer the complaint to the state. If the state has not been certified, the Commission will handle the complaint pursuant to Sections (e)(1) and (e)(2). Once a complaint has been referred to the state, the Commission will exercise jurisdiction only if the state has not taken final action within 180 days, or shorter period if the state so requires, or if the Commission determines that a state program no longer qualifies for certification under Section 225(f). Our proposed Section 64.605(g) reflects these provisions. We propose to follow procedures patterned after those in Rule Section 68.400.

IV. CONCLUSION

27. The regulations we propose in this proceeding are intended to implement the provisions of Title IV of the ADA. Interested parties filing comments are invited to offer alternative language, additional provisions or any other suggestions that will foster the intent of Congress to bring functional telecommunications equality to the hearing and speech-impaired of our nation. Many states already have relay systems in operation with various levels of carrier participation. We especially solicit comment from those who have experience with these systems. We hope to avoid problems experienced by others and to benefit from their success. In the final report and order that will follow, the Commission will adopt regulations that it believes best, and most efficiently, achieves the objectives of the ADA.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

28. In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601, the Commission issues the following initial regulatory flexibility analysis:

A. Action Contemplated and Reason for Action.

29. By this Notice of Proposed Rule Making, the Commission seeks to elicit comment on a series of proposals to implement Title IV of Pub. L. 101-336, the Americans with Disabilities Act of 1990, which requires all common

carriers to provide telecommunications relay services in order to provide hearing and speech impaired persons with greater access to telecommunications services.

B. Objective.

30. The objective of this proceeding is to fulfill the mandate of Congress to implement the ADA, thereby assuring that all Americans have reasonable access to telecommunications services and equipment.

C. Legal Basis.

31. The legal authority for this action is contained in Sections 1, 4(i), 4(j), 225, 403 and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 225, 403 and 410.

D. *Description, Potential Impact and Number of Small Entities Affected.*

32. The proposed rules are applicable only to common carriers, and it is not expected that they will have a significant impact on small entities because small entities may elect to pool requirements and provide service jointly. The overall economic impact of the proposed rules could be significant to carriers because they will be required to provide TDD services. Telephone rates for all subscribers will increase, but probably only by a marginal amount.

E. Recording, Recordkeeping, and Other Compliance Requirements.

33. There are about 1,500 telephone companies in the United States. By the legislation, each will be responsible for providing, either individually, through a competitively selected vendor, or in concert with other carriers, TDD relay services. Recordkeeping requirements are limited by statute to those needed to accomplish billing.

F. Federal Rules that Overlap, Duplicate or Conflict with these Proposed Rules.

34. None.

G. Any Significant Alternatives to Minimize the Impact on Small Entities.

35. None. Although Congress has provided telephone companies with flexibility in how they provide relay services, there is no provision for waiver of the requirement.

H. Comments are Solicited.

36. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this regulatory flexibility analysis. The Secretary shall send a copy of the Notice of Proposed Rule Making to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

VI. PAPERWORK REDUCTION ACT

37. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose no new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. EX PARTE PRESENTATIONS

38. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the certification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum in duplicate to the Secretary (with a copy to the Commission or staff member involved) which summarizes the data and arguments.) Each *ex parte* presentation described above must be clearly labeled "ex parte," state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

VIII. ADMINISTRATIVE MATTERS AND ORDERING CLAUSES

39. In accordance with the applicable procedure described in Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, interested parties may file comments on or before January 15, 1991, and reply comments on or before February 15, 1991. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

40. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of

their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of their comments, provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For additional information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

41. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i), 4(j), 225, 403 and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 225, 403 and 410, and 5 U.S.C. § 553, NOTICE OF PROPOSED RULE MAKING is hereby provided to amend 47 C.F.R. Parts 0, 32, 36 and 64 as indicated herein.

42. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to (a) the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981); and (b) to each State utility commission. The Secretary shall also cause this Notice of Proposed Rule Making to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Section 401. TELECOMMUNICATIONS RELAY SERVICES FOR HEARING - IMPAIRED AND SPEECH - IMPAIRED INDIVIDUALS.

(a) **TELECOMMUNICATIONS.** - Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING - IMPAIRED AND SPEECH - IMPAIRED INDIVIDUALS.

(a) **DEFINITIONS.**- As used in this section -

(1) **Common Carrier or Carrier.**- The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b).

(2) **TDD.**- The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) **Telecommunications relay services.**- The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) **AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES. -**

(1) **In General.**- In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) **Use of General Authority and Remedies.**- For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this Act by a common carrier engaged in interstate communication.

(c) **Provision of Services.**- Each common carrier providing telephone voice transmission services shall, not later than 3 years after the date of enactment of this section, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations-

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d); or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) for such State.

(d) **Regulations**. -

(1) **In General**. - The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that-

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c);

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) **Technology**.- The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.

(3) **Jurisdictional Separation of Costs**.-

(A) **In General**.- Consistent with the provisions of section 410 of this Act, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) **Recovering costs**.- Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) **Enforcement**.-

(1) **In General**. - Subject to subsections (f) and (g), the Commission shall enforce this section.

(2) **Complaint**.- The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) **Certification**.-

(1) **State documentation**. - Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

(2) **Requirements for certification**.- After review of such documentation, the Commission shall certify the State program if the Commission determines that-

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d); and -

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) **Method of funding**.- Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) **Suspension or revocation of certification**.- The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) **Complaint**.-

(1) **Referral of Complaint**.- If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

(2) **Jurisdiction of Commission**.- After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if -

(A) final action under such State program has not been taken on such complaint by such State-

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f).

(b) **Conforming Amendments**.- The Communications Act 1934 (47 U.S.C. 151 et seq.) is amended -

(1) in section 2(b) (47 U.S.C. 152(b)), by striking "section 224" and inserting "sections 224 and 225"; and

(2) in section 221(b) (47 U.S.C. 221(b)), by striking "section 301" and inserting "sections 225 and 301".

SEC. 402. CLOSED - CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

Section 711 of the Communications Act of 1934 is amended to read as follows:

SEC. 711. CLOSED - CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

Any television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement. A television broadcast station licensee -

(1) shall not be required to supply closed captioning for any such announcement that fails to include it; and

(2) shall not be liable for broadcasting any such announcement without transmitting a closed caption unless the licensee intentionally fails to transmit the closed caption that was included with the announcement.

APPENDIX B

A. Part 0 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 0) is proposed to be amended as follows:

1. The authority citation for Part 0 is proposed to be amended to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.91 is proposed to be amended by adding new paragraph (m) to read as follows:

(m) Acts upon matters involving telecommunications relay service complaints and certification, except for action on complaints raising novel or unusual issues.

B. It is proposed to amend Part 64 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 64), as follows:

1. The authority citation for Part 64 is proposed to be revised to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. New Section 64.605 is added to read as follows: Section 64.605, TDD Relay Service

(a) Definitions. As used in this section,

(1) Common carrier or carrier - The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in Section 3(h) of the Communications Act of 1934, as amended, and any common carrier engaged in intrastate communication by wire or radio, notwithstanding Sections 2(b) and 221(b) of the Communications Act of 1934, as amended.

(2) TDD - The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications Relay Services - The term "telecommunications relay services," "TDD relay service," or "TDD service" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Jurisdiction. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of the Communications Act of 1934, as amended, by a common carrier engaged in interstate communication.

(c) Provision of Services. Each common carrier providing telephone voice transmission services shall, not later than July 25, 1993, provide in compliance with the regulations prescribed herein, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with these regulations

(1) with respect to intrastate telecommunications relay services in any state that does not have a certified program under subsection (f) and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with subsection (d); or

(2) with respect to intrastate telecommunications relay services in any state that has a certified program under subsection (f) for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) for such state.

(d) Telecommunications Relay Service Standards.

(1) General operating requirements.

(A) Operators used in providing TDD relay service shall be trained to meet the specialized communications needs of individuals with hearing and speech impediments, and shall have sufficient skills in typing (at least 35 words per minute), grammar and spelling. They shall be trained in deaf culture and TDD etiquette, and shall be able to interpret typewritten American Sign Language and transliterate it to spoken English, and vice versa. Relay systems shall include adequate staffing to provide callers with reasonably efficient access under projected calling volumes, so that the probability of a busy response due to operator availability shall be comparable to what a voice caller would experience in attempting to reach a party through the voice telephone network. At a minimum, TDD relay systems shall be designed so that at least 85% of calls will be answered within ten seconds of commencement of ringing and relay service begun within 30

seconds of answer. Users shall have access to their chosen interexchange carrier through the TDD relay system, and to all other operator services, to the same extent that such access is provided voice users. Operators, if requested by the caller, shall attempt to complete calls 3 times consecutively, without delay, when receiving busy signals. TDD relay systems shall have procedures for handling emergency calls and operators shall be trained to handle such calls.

(B) TDD relay systems shall transmit messages between the TDD and voice caller in real time. Adequate network facilities shall be used in conjunction with the TDD relay systems so that under projected calling volume the probability of a busy response due to loop or trunk congestion shall be comparable to what a voice caller would experience in attempting to reach a party through the telephone network. TDD relay systems shall be capable of communicating with either the ASCII or Baudot format, at any speed generally in use.

(C) TDD relay services shall operate every day, 24 hours a day. Systems shall have adequate redundancy features, including uninterruptible power for emergency use, to assure continuity of operation. Carriers, through publication in their directories and otherwise, shall assure callers in their service areas are aware of the availability of their relay service and familiar with its use.

(D) TDD relay service users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

(E) TDD relay operators are prohibited from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use TDD relay services. Relay systems shall be capable of handling any type of call normally provided by carriers, such as non-coin sent-paid, third party number, calling card and collect calls, except coin-sent calls.

(F) TDD relay operators (and any other person having access to the content of a TDD message through his or her position) are prohibited from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of call.

(G) TDD relay operators are prohibited from intentionally altering a relayed conversation.

(2) Technology. No regulation set forth in this section is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications services to the disabled.

(3) Jurisdictional Separation of Costs.

(A) General. Where appropriate, costs of providing TDD relay services shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to Section 410 of the Communications Act of 1934, as amended.

(B) Cost recovery. Costs caused by interstate TDD relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate TDD relay services shall be recovered from the intrastate jurisdiction. In a state that has a certified program under subsection (f), a state commission shall permit a common carrier to recover the costs incurred in providing intrastate TDD relay services by a method consistent with the requirements of this section.

(e) Enforcement. Subject to subsections (f) and (g) of this section, the Commission shall resolve any complaint alleging a violation of this section within 180 days after the complaint is filed.

(f) Certification.

(1) State Documentation. Any state desiring to establish a state program under this section shall submit documentation to the Commission captioned "TDD Intrastate Relay Service Certification." The documentation shall describe the program of such state for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the state program.

(2) Requirements for Certification. After review of such documentation, the Commission shall certify, by letter, or order, the state program if the Commission determines that

(A) The program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such state in a manner that meets or exceeds the requirements prescribed in subsection (d); and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the state program.

(3) Method of funding. Except as provided in subsection (d), the Commission shall not refuse to certify a state program based solely on the method such state will implement for funding intrastate telecommunications relay services, but funding mechanisms shall not be labeled in a manner that offends the public.

(4) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a state whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint.

(1) Referral of complaint. If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a state and certification of the program of such state under subsection (f) is in effect, the Commission shall refer such complaint to such state.

(2) Jurisdiction of Commission. After referring a complaint to a state under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if

(A) final action under such state program has not been taken on such compliant by such state

(i) within 180 days after the complaint is filed with such state; or

(ii) within a shorter period as prescribed by the regulations of such state, or

(B) the Commission determines that such state program is no longer qualified for certification under subsection (f).

(3) Complaint procedures.

(A) Content. A complaint shall be in writing and shall contain: (a) the name and address of the complainant, (b) the name (and address, if known) of the defendant against whom the complaint is made, (c) a complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of Section 64.605 of the Commission's Rules, and (d) the relief sought.

(B) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(C) Number of copies. An original and two copies of all complaints and amended complaints shall be filed. An original and one copy of all other pleadings shall be filed.

(D) Service.

(i) Except where a complaint is referred to a state pursuant to Section (g)(1), the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(ii) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47. Proof of such service shall also be made in accordance with the requirements of said section.

(E) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

(F) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

(G) Defective pleadings. Any pleading filed in a complaint proceeding that is not in substantial conformity with the requirements of the applicable rules in this part may be dismissed.

FOOTNOTES

[1] S. Rep. No. 116, 101st Cong., 1st Sess. 2 (1989) (S. Rep.); H.R. Rep. No. 485, 101st Cong., 2d Sess. 31 (1990) (H.R. Rep.). Title IV of the ADA is quoted verbatim in Appendix A, *infra*.

[2] Section 711 is amended to require that any public service announcement, either partially or wholly funded by the federal government, shall include closed captioning of the verbal content of the announcement. It also states that a television broadcast licensee shall not be required to supply closed captioning for any such announcement that does not include closed captioning. Unless the licensee intentionally fails to transmit the closed caption that was included in the announcement, the licensee shall not be held liable for broadcasting any such announcement without transmitting a closed caption. *See* H.R. Rep. at 70. The legislation does not instruct the Commission, and we do not believe it necessary, to promulgate rules under this amendment. Any licensee violating section 711 would be subject to enforcement action. *See, e. g.*, 47 U.S.C. § 503. Section 711 therefore will not be discussed further herein. In addition to adding Section 225 and amending Section 711, the ADA makes conforming amendments to Sections 2(b) and 221(b).

[3] *See* Section 225(d).

[4] H.R. Rep. at 34.

[5] *See* Appendix A, §§ 225(a)(3) and (c).

[6] "Telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. This term includes services that enable communications between the user of a TDD or other nonvoice terminal device and an individual who does not use such a device. The term "TDD" means a telecommunications device for the deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. 47 U.S.C. §§ 225(a)(2), (3).

[7] Notice of Proposed Rule Making and Further Notice of Inquiry, CC Docket No. 87-124, 3 FCC Rcd 1982 (1988) (Notice).

[8] *See* Third Report and Order in CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983); Further NPRM at 6225.

[9] Baudot and ACSII formats are currently used among TDD users. Because the speeds and coding schemes are different, conversion is required to allow a Baudot TDD to "talk to" an ASCII machine, and vice versa.

[10] Parties commenting on issues raised in response to this Notice of Proposed Rule Making are requested not to rely upon or incorporate by reference submissions filed in CC Docket No. 87-124, but instead to file new, complete pleadings.

[11] The President signed Pub. L. 101-336 on July 26, 1990. In this order and in the rules the terms telecommunications relay services, TRS, TDD relay service and TDD service are used synonymously because today relay services rely on oral translation of TDD transmissions. *See* note 6, *supra*. The ADA makes clear, however, that the regulations we are adopting are not to impair the development of new technology. 47 U.S.C. § 225(d)(2).

[12] Audiotext services, which connect callers to recorded information services, are not intended to benefit from the ADA. *See* H.R. Rep. at 68. Parties are asked to comment on what rules, if any, should be adopted relating to audiotext and other interactive services.

[13] Subpart F of Part 64 of the Commission's Rules, Furnishing of Customer-Premises Equipment and Related Services Needed by Persons with Impaired Hearing, Speech, Vision or Mobility, appears the most logical place to put rules implementing the ADA. The proposed rules are attached hereto as Appendix B.

[14] S. Rep. at 81.

[15] Some state guidelines for intrastate systems have such requirements. *See, e.g.*, Standards of Service for Telephone Utilities, 83 Ill. Adm. Code Part 756. *See also* discussion regarding network blocking and congestion, *infra*, para. 12.

[16] Conversion of computer stored text to human-like speech is called text-to-speech. Although automated systems have the potential of providing relay services in an efficient manner, there is no evidence before us showing such automated systems currently could satisfy the requirements of Title IV. For example, the technology to correct errors and abbreviations is imperfect and, according to AT&T, will be several years in development. AT&T Letter To Honorable Edward J. Markey, October 4, 1989. Fon-ex operates a computer system that permits "conversation" between any DTMF (tone dialing) telephone and a TDD. The telephone is used to spell words, with contextual adjustment performed by the intervening computer. Such a system permits an unimpaired individual to communicate with a person using a TDD, though possibly more slowly than through an operator. Speech to text conversion also is under study.

[17] AT&T, for example, designed its hierarchical network so that the overall probability of a caller encountering a trunk busy was no more than one percent. Now, it measures congestion in its dynamic non-hierarchical network by more complex criteria. We need not propose a specific network congestion criterion, but we will propose a general standard that reflects overall network congestion performance. Following standard performance criterion for intrastate TDD systems, we will also propose a specific standard for TDD system answering, *viz.*, that at least 85% of calls to the TDD system must be answered within ten seconds. *See* AT&T Letter to New Jersey Board of Public Utilities, July 27, 1990. To assure that TDD users are not then simply put on hold, we will require that relay service begin within 30 seconds of answering.

[18] H.R. Rep. at 68; Appendix B at Section 64.605(d)(1)(B).

[19] Generally, transmitting a given message via a TDD relay system will take longer than by normal voice means. This may effectively result in some TDD relay calls taking longer and therefore costing more than an equivalent voice call communicating the same message. However, no reliable calculus has been offered to measure the average disparity in calling times. Moreover, the term "functional equivalence" in Section 225(d)(1)(D) normalizes this disparity by definition. The ADA requires TDD relay call rates not to be greater than functionally equivalent voice calls on the basis of call duration, time of day or distance -- not message content. However, neither the Commission nor Congress opposed implementation of rate discounts. S. Rep. at 82 (intrastate); Further NPRM at 6222 (interstate).

[20] Non-coin sent-paid calls are generally considered to be calls paid for via credit cards.

[21] There are various ways TDD relay systems might operate. Access to a TDD relay center could be offered via a toll-free telephone number and the charges for the call handled through or by the center. Alternately, the local carrier or IXC could intercept the originating call for credit card verification or other administrative operations, or the carrier could automate call processing operations. A center -- or carrier -- that checks credit and declines to complete the originator's call on the basis of a declined credit authorization would not appear to violate the call refusal prohibition of Section 225(d)(1)(E) because a similar call not using the relay service would not be completed. Commenters are invited to offer their views on this or other anomalous possibilities.

[22] S. Rep. at 82.

[23] We seek comment on this analysis.

[24] S. Rep. at 82.

[25] Further NPRM at 6226. The Commission noted that the service suggested did not differ from current capabilities of modem-equipped PCs to communicate directly with TDDs in the ASCII format. *Id.* at n. 31.

[26] S. Rep. at 82.

[27] 47 U.S.C. § 410.

[28] *See* also discussion in para. 20, *infra*.

[29] We ask interested parties to include such carriers in their analyses of the matters discussed in this section.

[30] We will refer the matter to a Joint Board if it appears that changes in our jurisdictional separation rules are necessary or appropriate.

[31] Of course, the rule we finally adopt may be different from our proposal. We are providing notice that we may adopt a final rule that implements our decision with regard to these issues.

[32] H.R. Rep. at 68-69. This language does not preclude joint inter-, intra- state systems. The House Report specifically states the Commission "is granted broad discretion to structure a cost recovery mechanism to determine the most appropriate method of recovery of interstate . . . and intrastate costs."

[33] Interested parties are also asked to provide suggestions on how TDD relay system charges should be distributed among services and how much users should be charged. All such charges, we note, must be accurate and otherwise compliant with the Act. *See; e.g.*, Sections 201-05 of the Act.

[34] H.R. Rep. at 69.

[35] A number of state systems, such as that in Kansas, offer residents an outgoing interstate calling capability. It would be valuable to have analyses of whether cost recovery mechanisms used for these systems are consistent with the ADA or, if not, what modifications would be necessary. *See also* n.32, *supra*.

[36] *Id.* at 69, 70. It further states:

> For example, California's relay service is funded by a surcharge that appears on telephone bills as 'Deaf Trust Fund.' This unfortunate choice of words is offensive and should be precluded.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—281 - 728/40006

BLANK
PAGE